The Second Part
OF
REPORTS
AND
CASES
OF
LAVV,

Argued and Adjudged in the COURTS at
WESTMINSTER,
In the Time of the late
QUEEN ELIZABETH,
From the 18th to the 33th year of her Reign;
Collected by a Learned Profeſſor of the LAW,
WILLIAM LEONARD, Eſquire,
Then of the Honorable Society of GRAYS-INNE.

Faithfully Rendred into Engliſh out of the Originall Copy,
by *W. H.* Eſq;

With Alphabeticall Tables *of the Names of the* Caſes, *and of the* Matters *contained in the* BOOK.

LONDON,
Printed by *Tho. Roycroft*, for *Nath. Ekins*, and
are to be ſold at his Shop at the Sign of the Gun
in *S. Pauls*-Church-yard, 1659.

Nicholas Lechmere of the
Middle Temple Esqr 1703

TO THE READER.

Curteous Reader,

I Here preſent to thy view and ſtudy, The ſecond and laſt Part of the *Reports* and *Caſes*, collected and taken in *French* (by that grave, induſtrious, and Learned profeſſor and Practiſer of the Common Law, *William Leonard* Eſq; ſometimes of the Honorable Society of *Grays-Inn*) in the Reign of the late Queen *Elizabeth*; which *Reports* were of ſuch ineſtimable value, by reaſon of their authentick Arguments, that they were tranſcribed by divers Honorable and Learned perſons, as may appear by my *Epiſtle* to the firſt part of His *Reports*: theſe, together with the firſt part, being all the ſelect *Caſes*, by many worthy *Lawyers* of this *Nation*, thought to be worthy the Preſſe. How worthy the *Author* is of thy ſerene and candid cenſure I refer to thy deliberate judgment; *Hic labor, hoc opus eſt*: As for the Work, it requires *totum, non mixtum hominem*, an intire man, without other diverſions. If thou be'ſt a Repreſentative Warrior, for the lives and patrimonies of thy *Clients*, I here preſent thee with a weapon to defend them; and though the *Military* Profeſſion be very Noble and Honorable, becauſe moſt dangerous; yet the Profeſſion of the *Law*, herein challenges precedency, πρωτεῖα, becauſe the Sword is but a ſervant to Juſtice, conſecrated by the Almighty, to maintain and defend the *Law*; for if men were juſt, the Sword might be ſheathed: and, to ſpeak in the *Dialect* of Sir *John Davies*, in his eloquent Epiſtle to the *Iriſh* Reports; We ſee Heathen Kingdoms ſubſiſt without Religion, and you may imagine a Kingdom to ſubſiſt without Phyſicians, as once *Rome* did, but all men at all times, and in all places, ſtand in need of Juſtice and Law, which is the commenſurate rule of Juſtice, and conſequently *Lawyers*, who are the Miniſters and Secretaries of Juſtice, the Queen and Empreſſe of all other Morall Vertues according to the axiome, or maxime, *Conciliarii ſunt organa Juſtitiæ in corpore Politico*. But (Candid Reader) not to defatigate thy clemency, neither to treſpaſſe too much upon thy patience with a prolix Epiſtle, I do here tender theſe his laſt *Reports* to thy judgment, upon a ſerious and deliberate conſideration, preſuming they (as well as the firſt) may tend to thy uſe and benefit, in the courſe of thy ſtudy and practice of Law, which is all that is deſired.

The Names of the Learned Lawyers *Serjeants at* Law, *and Judges of the ſeverall* Courts *at* Weſtminſter, *who Argued the* Caſes, *and were then Judges of the ſaid ſeverall* Courts; *Viz.*

A

Anderſon, Lord chief Juſtice of the Common Pleas.

Anger.

Attham, Serjeant at Law, afterwards one of the Barons of the Exchequer.

Atkinſon.

Ayliffe, Juſtice of the Kings Bench.

B

Beaumont, Serjeant at Law, after Judge of the Common Pleas.

Bromley, Lord Chancellor of England.

Bacon, afterwards Lord Chancellor of England.

Barkley.

C

Coke, afterwards Lord chief Juſtice of the Common Pleas.

Clench, one of the Judges of the Kings Bench.

Cooper, Serjeant at Law.

Clark, Baron of the Exchequer.

Coventrie, after Lord Keeper of the Great Seal.

D

Daniel, one of the Judges of the Common Pleas.

Drew, Serjeant at Law.

Dyer, Lord chief Juſtice of the Common Pleas.

E

Egerton, Sollicitor of the Queen, after Lord Chancellor of England.

F

Fleetwood, Serjeant at Law, Recorder of London.

Fuller.

Fenner, Serjeant, after Judge of the Kings Bench: and then after Lord chief Juſtice.

G

Gawdy, Serjeant at Law.

Gawdy, one of the Judges of the Kings Bench.

Golding,

Golding, Serjeant at Law.
Glanvile, one of the Judges of the Common Pleas.
Gent, one of the Barons of the Exchequer.
Godfrey.

H

Haughton, Serjeant at Law, after one of the Judges of the Common Pleas.
Hammon, Serjeant at Law.
Harris, Serjeant at Law.
Heale, Serjeant at Law.
Hobart, after Lord chief Juſtice of the Court of Common Pleas.

K

Kingſmill, Judge of the Kings Bench.

L

Laiton.
Leonard.

M

Meade, Serjeant at Law, after Iudge of the Court of the Common Pleas.
Morgan, Serjeant at Law.
Manwood, Lord chief Baron of the Exchequer.
Mounſon, Iuſtice of the Common Pleas.

O

Owen, Serjeant at Law, after Baron of the Exchequer.

P

Popham, Attorney Generall of the Queen, after Lord chief Iuſtice of the Kings Bench.
Periam, Iudge of the Common Pleas.
Pepper, Attorney of the Court of Wards.
Plowden.
Puckering, the Queens Serjeant at Law.

R

Rhodes, one of the Iudges of the Common Pleas.

S

Snag, Serjeant at Law.
Snig, one of the Barons of the Exchequer.
Shuttleworth, Serjeant at Law.

T

Tanfield, Serjeant at Law: after Lord chief Baron of the Exchequer.
Topham.

W

Wray, Lord chief Iuſtice of the Kings Bench.
Windham, one of the Iudges of the Common Pleas.
Walmeſley, Serjeant at Law, after one of the Iudges of the Common Pleas.

Y

Yelverton, Serjeant at Law, after one of the Iuſtices of the Kings Bench.

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THE

The Second Part of

REPORTS and CASES OF LAW,

Argued and adjudged in the time of Queen *Elizabeth*, from the eighteenth, to the three and thirtieth year of her Reign.

Mich. 30 *Eliz.* In the Common Pleas. *Rot.* 30.

I. Kirkman *and* Reignolds *Case.*

THe Caſe was, That a Leaſe was made unto two, Habendum to them, and to two others for four lives, and the longer liver of them; It was reſolved by the whole Court, That the two named in the Habendum, did not take any thing; and that if the firſt two in the Premiſſes of the Deed die, that there ſhall be no occupancie; For the lives of the two in the Habendum was intended an Eſtate to them, and not a limitation of the Eſtate of the firſt two: And ſo it was reſolved, 28. Eliz. in the Kings Bench, Rot. 509 in Hubbart and Windſmores Caſe. Leaſes. Hubbart and Windſmores Caſe.

Mich. 32 and 33 *Eliz.* In the Kings Bench. *Rot.* 19.

II. Thatcher *and* Damports *Caſe.*

THatcher recovered againſt Damport as Adminiſtrator of one Zouch, The Defendant put in Bail, and afterwards Judgement was given againſt the Defendant in this manner: Ideo videtur Juſticiariis, quod querens recuperet debitum ſuum verſus, &c. and thereupon a Scire facias was ſued againſt the Bail, and a good and lawfull Judgement given againſt them; And they brought a Writ of Error to reverſe the Judgement given againſt them, and aſſigned Error, becauſe Judgement was entred againſt them before a good and lawfull Judgement was given againſt the Defendant himſelf; For Videtur Juſticiariis quod querens recuperet, &c. is not any Judgement; and the Court held, that the Judgement given againſt the Bail, ought to be reverſed, but that the other Judgement ſhould ſtand ſuch as it is, neither affirmed, Error. Judgement againſt the Bail.

firmed, nor diſaffirmed, but the Bail ſhould not cauſe the ſame Judgement for their diſcharge to be entred, And afterwards came Thatcher, and ſurmiſed, the nullity of the ſaid Judgement, and prayed that Judgement might be entred for him in forma juris, & habuit: And now upon this new Judgement, Damport brought a Writ of Error, and aſſigned for Error the entry of that new Judgement, for before a Judgement was entred, tiel queb. and Thatcher proceeded upon it, and had a Scire facias againſt the Bail, and Judgment thereupon given againſt the Bail; Alſo the Record was removed by Writ of Error, and this ſecond Judgement is meerly erronious, for then there ſhould be two Judgements; and they ſhould give Judgement upon a Record, which was not before them.

Gawdy Juſtice, The Writ of Error is to remove the Record, Si Judicium inde redditum ſit, by which if Judgement be not given, the Record doth remain unremoved, and then they may well enough give Judgement; For the former pretended Judgement was no Judgement at all, and the Record is not removed, As 4 Eliz. Dyer 206. a Certiorari to remove a Record, capt. in Curia noſtra, whereas it was in Curia of the predeceſſor, the Record is not removed. The former Writ of Error was to remove the Record of the Scire facias againſt the Bail which might be removed, although the other Record did remain, for they are two diſtinct Judgements. And ſuch was the opinion of the other Juſtices; And afterwards upon advice of the whole Court, the Judgement againſt the Defendant himſelf was affirmed, but that which was given againſt the Bail was reverſed, becauſe given before Judgement given againſt the Defendant himſelf.

Trinit. 32 *Eliz.* In the Kings Bench.

III. Werdman *and* Yates *Caſe*.

Partiton. WErdman brought a Writ of Partition againſt Yates and others, who all appeared, and confeſſed the Action, and afterwards brought Error, which was entred, Paſch. 27 Eliz. Rot. 43. and they aſſigned Errors, and the opinion of the Court was againſt them, and they ſeeing it, did diſcontinue their Writ of Error, and now they ſued a new Writ of Error out of the Error. Chancery, directed to the Lord Anderſon, being dated 19 Novemb. 31 Eliz. containing, That whereas a Writ had been directed to him to remove ſuch a Record, That all the Record is not yet removed; wherefore this was to remove the reſidue of the ſaid Record; Upon which Writ was ſent hither a ſmall parcell of the Record, upon which the Plaintiffs ſued a new Writ of Error out of the Chancery, Coram vobis reſidet, and that was, Hill. 31 Eliz. and it was entred upon a new Roll of the ſame Term, and not upon the ancient Roll, and thereupon new Errors were aſſigned in the judiciall proces out of the body of the Record.

1. That the Plea was diſcontinued for Pone was awarded againſt three of the Defendants, and idem dies not given to the other two, nor any thing ſpoken of them.

2 Becauſe there were not fifteen days betwixt the date of the Pone, and the Return of it, (ſcil.) the firſt day of the Return, i. the firſt day of Eſſoins, as ought to be by Law.

3 Judgement was given that the Defendants ſhould be amerced, where they appear upon the firſt Proces, and thereupon the Plantiff ſued a new Writ of Diminution, one to the Lord Anderſon, and the other to the Cuſtos Brevium, And now came and pleaded all the matter aforeſaid, viz. the former Writ of Error, the proceeding in it, and the diſcontinuance of it, and demanded Judgement if the Plaintiff ſhould have a new Writ of Diminution, upon

upon which the Plaintiff did demurre: Coke, this second Writ of Error is not maintainable: For the first Writ sent to the Lord Anderson, could not be sued out of the Chancery, for it is not a Writ of Error, but a Writ of Diminution: For in the Register there are but two Writs of Error, the first to remove Record, the second, Quod coram vobis residet, 2 H. 7. 19. and in the Writ there is not any mention of Error, and therefore it cannot be a Writ of Error, and if there be not any such Writ in the Register, then it is a good argument to say There is no Writ at all, as the Lord Dyer argued in the Lady Hales Case, 5 Eliz. 262 in Plowden in the Case of the Writ of Escheat: Also it is against all the Presidents, That a Writ of Error, Quod coram vobis residet, should be otherwise entred then upon the first Record, and not upon a new Record, and the Writ of Diminution is not an Originall Writ, and ought alwayes issue out of the Court where the Writ of Error is depending: And also the party cannot now alledge Diminution, i. after a Scire facias ad audiendum Errores, which see 22 E. 4. 45. by Hussey: For by the Scire facias ad audiendum Errores, he affirms the Record to be full: So 7 E. 4. 25. After the Defendant in the Writ of Error hath pleaded in nullo est erratum, he shall not alledge Diminution, for the parties are agreed upon the Record, 28 H 6. 10. after a Scire facias, the Plaintiff shall never assigne Errors in fact, &c. Tanfield contrary, he agreed, that a Writ of Diminution cannot be sued out of the Chancery, but that will not hurt us, for it is idle and utterly void: And when the Record is removed, it is not materiall how it comes in, so as it be here, for they are both the Kings Court, as it is in the common Case of Indictments: and then the Writ of Error is to examine the Record, Quod coram vobis residet, And although the same be in divers Rolls, the same is no matter of Exception; but if the Roll be entred in a wrong Office, it is not good, but if all be in one Office, the misfiling of the Roll will be no hurt: So here, it is not so formall as it ought; yet it is not any prejudice to us. But the great matter is, If the Plaintiff may assigne new Errors and have a new Writ of Diminution, two of the Errors assigned in the Meine Proces, but the third is in the Record it self; i. the Judgement. And there is no doubt, but that a man may have divers Writs of Error, but he shall have but one Supersedeas, and so divers Errors, but one delay: Also it is not a Writ of Diminution which we have sued, for I do not say, that it is a thing below, which is not here, but I say, that is not a thing below, which ought to be, viz. there is not any discontinuance; but the Court awarded that Writ for their satisfaction, for the non esse of the thing shall come on the other side, and 9 E. 4. the Court awarded a Certiorare to enform themselves. And he said, That after a Scire facias, the Plaintiff may assigne new Errors, Trin. 20 H. 7. Rot. 84. betwixt Edge-Court and London, a Writ of Error was brought against two, and after Errors assigned, one of the Defendants died, upon a new Writ of Error could be assigned: But here the first Record is discontinued and determined, for which there is not now any Record which may be objected against us, nor any thing in it: as 20 H. 7 A man avows for a Rent due at such a day, and is nonsuit; Now he may avow for the same Rent, and suppose the same to be due at another day, for he shall not be estopped by the Record upon which he was nonsuit: and so here upon the whole matter, the Writ out of the Chancery is not materiall, the Roll is not misplaced, but is in the right Office: Also this is not a Writ of Diminution, but a Writ to enform the Justices, Wherefore upon the whole matter the Writ of Error will well lie. It was adjourned. *S. C. post 118.*

Diminution.

Entry of Records.

Estoppell.

Mich.

Mich. 31 and 32 *Eliz.* In the Kings-Bench. *Error.*

IV. Savacres *Case.* Rot. 7.

Error. A Writ of Error was brought by Savacre and the Bishop of Glocester upon a Judgment given in a Quare Impedit for the Queen, and Errors assigned. 1. Attachment was awarded against the Defendants in the Quare Impedit, returnable quind. Pasc. at which day Savacre appeared, and cast an Essoyn; and notwithstanding that, a Distress was awarded against them both, returnable Crastin. Trinit. and this awarding of the Distress was erroneous, for the Essoyn was, as appeareth, to save, &c. and therefore against him no Distress ought to have been awarded: And upon alledging of Diminution the Record of the Essoyn was certified, but the same doth not appear upon the Plea Roll. 2. This Record is, ideo ipsi in injuria, and so both the Defendants are amerced for their default of appearance 15 Pasch. whereas Savacre was then Essoyned, and so no case to amerce him.

Coke, The Original Writ was sued Mich. 26 Eliz. returned 15 Hillarii, and then both the Defendants made default, for which an Attachment was awarded, returnable 15 Pasc. and then Savacre appeared, and Judgment given, quod ipsi sint in injuria, in which point the Error is apparent: but I conceive that it is not Error, for upon the Attachment the parties ought to put in Sureties for their appearance; and the said Sureties took upon them, that the Defendants and each of them should appear; and if they or any of them make default, they shall be amerced: And so here, this Judgment, ideo ipsi in injuria, doth refer to the Sureties, not to the parties, for the Defendants shall not be amerced until the end of the Suit, and but once onely in an Action: which see Book Entries 464. where there was but one Defendant: and therefore if the amercements shall be referred to the Defendant, then it shall be ideo ipse, not ipsi, &c. And that is the Reason wherefore the Queen, nor an Infant, shall not finde Pledges, for no amercement shall be upon their default, therefore it were in vain for them to finde Pledges, &c. If the Sureties be amerced where they ought not to be amerced by the Law, yet the Defendant shall not have a Writ of Error thereupon, for he is not the party grieved by the amercement: and upon that Reason it is, if in a Scire facias against the Bayl erroneous Judgment be given, the Defendant in the Action shall not have a Writ of Error. The awarding of the Distress upon the Roll against both, where one of them onely made default, is not Error, especially as this case is; for although one of them was essoyned until the day aforesaid, yet at that day they make default, and so the Distress well awarded against them: and although the Writ was not well awarded, yet when they appear Crastin. Trinit. at the day of the Return of the Distress, all mesn defaults in the Proces are saved, and so the misawarding of the Distress by appearance after is supplyed: as 39 E. 3. 7. The Law requires, that in an Action founded upon the Statute of Præmunire, &c. 27 E. 3. the Defendant have Garnishment by two Months, yet if the Defendant, not having such warning, appear, now the Proces is good enough: So 9 E. 4. 18. where upon any Proces the Defendant doth appear, although the day of appearance be not lawful, yet he shall be put to answer: and see many Cases there to that purpose. And so was the Opinion of the Court in the principal Case.

As to the second Error, That this Judgment, ideo ipsi in injuria, shall be referred to the Sureties onely, and not to the party, and that the Defendant shall be but once amerced in an Action; True it is, he shall be amerced

amerced but once for one default; but if there be many defaults, the Defendant shall be amerced ſeverally for the ſeveral defaults for every offence; and it ſhould be unreaſonable that the Sureties ſhould be amerced, and that the Defendant, who is the principal, ſhould be freed: which ſee in the book of Entries 193. ipſique & plegii ſui in miſericordia, &c.

Trinit. 32 *Eliz.* Rot. 76. In the Kings-Bench.

V. Nevil *and* Cooks *Case.*

IN an Action of Covenant the Plaintiff declared, That where it was covenanted betwixt the Plaintiff and the Defendant, That each of them upon requeſt ſhould be accountable to the other for all the Corn growing upon ſuch a place, and that upon ſuch account the one of them ſhould deliver to the other the moyety of the Corn, or the profit of it: and whereas the Defendant had taken all the ſaid Corn, ſcil. twenty loads of Wheat, forty loads of Barley, and thirty loads of Peaſe, growing upon the ſaid Lands, and had been required to render account of the ſaid Corn, which he refuſed to do: The Defendant traverſed the requeſt, upon which they were at iſſue, and it was hereupon demurred: and it was moved, that the Traverſe was not good, but the Defendant ought to ſay, that the Plaintiff did not require him modo & forma; but the Exception was not allowed, but the Traverſe was holden good by the whole Court, and Judgment was given for the Plaintiff. Covenant.

Trinit. 32 *Eliz.* In the Kings-Bench.

VI. Elizabeth Dormers *Case.*

ELizabeth Dormer was indicted upon the Statute of 23 Eliz. of Recuſancy; and Exception was taken to the Indictment, becauſe that theſe words of the Statute were omitted out of the Indictment, viz. [non habens aliquam rationabilem cauſam.] But the Exception was not allowed; for Wray, chief Juſtice, ſaid, That upon conference betwixt himſelf and all his companions, it was reſolved by them, That thoſe words need not be put into the Indictment, but are to come in on the other ſide. Another Exception was taken to the Indictment, That ſhe being of the age of ſixteen years refuſed to come to any Church (contra formam Statut. 1 Eliz. & in malum exemplum, &c. & contra formam Statuti in hujuſmodi caſu editi & proviſi) and the Statute of 1 Eliz. doth not ſpeak of ſixteen years, but the ſame is mentioned in the Statute of 23 Eliz. Fenner was of Opinion, that the laſt Contra formam Statuti ſhould be referred to the Statute of 23 Eliz. Wray contrary, and that it ſhould be referred to the Statute of 1 Eliz. It was adjourned. Indictment upon the Stat. of 23 *Eliz.* of Recuſancy.

16 *Eliz.* In the Common-Pleas.

VII. Cranmers *Case.*

THe Caſe was, That Thomas Cranmer, late Archbiſhop of Canterbury, made a Feoffment in Fee to the uſe of himſelf for life, without impeachment of Waſte, and after his deceaſe to the uſe of his Executors for twenty years, and after the twenty years to the uſe of his Son and Heir in tayl. And afterward Thomas Cranmer was attainted of Treaſon, and dyed, ſo as he could not make Executors, but dyed inteſtate without any Feoffments to uſes.

 aſſign-

assignment. (Note, the limitation was to his Executors and Assigns.) Queen Mary claimed the term limited as aforesaid, and granted the same over, the Heir in tayl entered, and Leased the same for years, the Patentee entered, and the Lessee of the Heir of the Tenant in tayl brought Ejectione firmæ.

Manwood. All the doubt of this case is, If the said term was in Tho. Cranmer so as he might forfeit it? And he conceived, that the said term was in Tho. Cranmer, and that he had not power onely to dispose of it, but also had possession of it: 11 H. 4. 186. Scire facias 67. And Br. Annuity 17. Such a Grant is good and effectual, and if he do not grant it, his Executors shall have it, and yet the term was not limited to him, but he shall have it by implication of Law. 39 E. 3. A Lease was made to one, his Heirs and Assigns during his life, and one year after, the Executors shall have the said term after the death of the Lessee, yet the said term was not limited to him: 7 E. 3. A Lease made for term of life and a year after, in that case the term is conjoyned unto the Estate for life by the act of the Grantor himself; and there is a difference when the Remainder is joyned to the particular Estate by the act of the Grantor, and by any Purchase, Grant, or any act after: for in the first case the Remainder shall be executed, but in the latter not. A Lease for life, the Remainder in tayl, the Remainder to the right Heirs of Tenant for life; he in the Remainder in tayl dyeth without issue in the life of Tenant for life, now the Fee is executed to the Freehold, &c. and the Heir shall not have a Scire facias where such conveyance is made by Fine. See 17 E. 3. 29. In a Cui in vita, A. Executor of B. came and said, that the Land in demand was Leased to the said B. for the term of his life, the Remainder for the term of eight years to his Executors, and prayed to be received, and they were received. See 19 E. 3. A Lease was made for life to A. the Remainder to his Executors for twelve years: the Lessee for life dyed, the Executors dyed, there it is agreed, that the Executors of the Executors should have an Action of Covenant, if they be vouched. And see 20 E. 3 Quid juris clamat 31. A Lease is made to A. for life, and if A. dyeth within twenty years, that his Executors shall have the term until the end of such term: and in a Quid juris clamat against A. he saved his term by protestation, which proves, that the term was quodam modo in him. 49 E. 3. A Lease for life unto A. the Remainder to his Heirs and Executors for twelve years, and afterwards the Lessor confirms the Estate of the Lessee for life, to have and to hold the Land to him for life, and thirteen years over to his Executors; the Lessee deviseth the term, and the Devise holden good, which proves, that the term was in him.

Harper, Justice, contrary: Many cases put before may be answered; for in the said case the term is limited to begin immediately, and not by way of Remainder, or after the death of the Lessee, and then the Executors in the life of the Testator are not known, nor able to seek any thing by the name of Executors, and therefore that term shall take its begining in the life of the Testator: But in the Case at Bar the term is limited to the Executors after the death of the Testator, and the Executor takes the term as a Purchasor, and he hath it not as a Chattel of the Testator, but as his own Chattel. And in the Case of Receit before cited, the Executor shall be received as Executor, for the term was limited to him as Executor. And here the Statute of 27 H. 8. is to be considered, for it extends as well to Chattels as to Freehold, and the Statute doth execute the possession to the use limited for years, as for life, or in Fee: and here the use is limited to the Executors, and not to the Testator, and therefore it shall not be otherwise transferred. And therefore if a man seised in the Right of his Wife discontinueth, and afterwards the Discontinuee makes a Feoffment in

Fee

Fee unto the use of the said Husband and Wife for their lives, in that case the Wife shall not be remitted; for the Statute doth transfer according to the use, and the use was limited for their lives, therefore they shall not be in of another Estate.

Dyer, chief Justice, to the same intent: The Feoffor, i. Thomas Cranmer, limits all the uses, and therefore he shall not have that which he hath limited; and it is in the nature of a Reservation, which shall be taken strictly and very strong against him who made the Reservation: and he relied much upon the last Reason urged by Harper upon the Statute of 27 H. 8. that this was limited to the Executors, and not to him who limited it; and therefore the possession shall be executed to the Executors, to whom the use was limited; and this term shall not be Assets in the hands of the Executors: And he said, That he had seen a Record, 2 H. 8. setting forth, That A. having Feoffees to his use, devised, that his Feoffees should sell his Lands, who did accordingly; now the mony coming by the sale shall be Assets, &c. but it is not so limited in our case, therefore it shall not be Assets. A Lease is made to A. for life, the Remainder to the right Heirs of B. B. purchaseth the Estate of A. the Estate in Remainder is not executed, for it is not conveyed by the Grant of the first Grantor, but by the Act of another person after the Grant. A Lease for life to A. the Remainder to a Feme sole for years, they intermarry, Waste is committed, the Lessor brings an Action of Waste, he shall recover as well the Estate for years as for life. A. Leaseth unto B. for life, the Remainder unto the Executors of A. for years, the Remainder over in Fee to a stranger, the Remainder for years is good, for the Lessor cannot limit such an Estate to himself, and the Executors shall take the Estate as Purchasors, and the term shall be in abeyance until the death of A.

There was a Case before the Lord Brook in the time of Queen Mary, viz. A Lease was made for life, Proviso, that if the Lessee dyeth within the term of sixty years, that the Executors shall have the Lands, as in the Right and Title of the Lessee, pro termino totidem annorum, which do amount to the number of sixty years, to be accounted from the said Indenture. The Opinion of the Justices of the Common-Pleas upon the Case was, That the term was not in the Lessee for life. So this future term in the principal Case was not in Tho. Cranmer. But see that Case cited by Dyer, reported by himself 4 Ma. 150. and there the Opinion of the Court was, That the same was not a Lease, but a Covenant. 79

And afterwards in the principal Case Judgment was given for the Plaintiff, That the future term was not forfeited by the Attainder of Cranmer.

VIII. 7 *Eliz.* In the Common Pleas.

THe Case was, J. S. is seised of a Close adjoining to the Close of J. D. and J. S. ought to enclose against J. D. J. S. leaseth his Close to another for years, rendring Rent, J. D. puts in his cattell into his own Close, who for want of enclosure escape into the Close of J. S. and before that they be levant and couchant, J. S. distrains them for his Rent: It was said by Manwood, Justice, that the distresse was not well taken; for there is a difference when the cattell come upon the Lands of another in the default of the owner of the cattell, as by escape or stray, and where in the default of another: For in the first case the Lord may distrain them before they be levant and couchant; but in the latter case not: Also a Rent reserved upon a Lease for years, is a new Rent, and not like unto an ancient Rent, due upon an ancient Tenure betwixt the Lord and the Tenant: For, for a Rent reserved, Distress for Rent.

ſerved upon a Leaſe for years, or for a Rent charge a man cannot diſtrain the cattell, before they be levant and couchant upon the Lands, although they come upon the Lands by eſcape, eſtray, &c. Dyer, The Lord cannot diſtrain the cattell which eſcape into the Land of his Tenant for want of encloſure of his Tenant before they be levant and couchant; and yet the ſeignory is favoured for the antiquity of it: But here is new Rent, not in reſpect of any ſeignory, but of a reſervation upon a Leaſe for years, and therefore no diſtreſſe before the cattell be levant and couchant upon the Lands, Quod Harper & Mounſon conceſſerunt, and Judgement was given accordingly.

IX. 17 *Eliz.* In the Common Pleas.

Writ of Entry in the Per.

THe Caſe was, In a Writ of Entrie in the Per, againſt A. and B. A. pleaded ſeverall tenancy: It was holden by Dyer, chief Juſtice, that it is not any plea. Harper Juſtice: In Aſſiſe it is no plea; for here the Land is not in demand; but here it is a good plea, and the Demandant ought to maintain his Writ; Manwood, In no action founded upon diſſeiſin is this good: For although the Demandant by policy will bring his Writ againſt the Tenant of the Land, and another who he will name in the Writ, upon truſt and confidence, that he will not agree with the Tenant of the Land in Dilatories, for the Tenant of the Lands ſhall not be received to plead Dilatories; Yet in that caſe ſeverall Tenancy is no plea for the Tenant, but in a Formedon, or other ſuch like action, which is not grounded upon diſſeiſin, if the Writ be brought in ſuch manner as above, the Tenant by policy, that he may have the view, and other reaſonable delays, may plead ſeverall Tenancy, and ſo enforce the Demandant to maintain his Writ, but contrary in the Caſe at Barre, and ſo it was adjudged per Curiam.

Severall Tenancy where no good Plea.

19 *Eliz.* In the Common Pleas.

X. Creſwell *and* Cokes *Caſe*.

CReſwell brought Debt againſt Coke, and demanded 200 Marks upon the Statute of 13 Eliz. of fraudulent Deeds, Gifts, &c. upon the ſecond clauſe of the Statute, viz. That all parties, or privies to ſuch fraudulent Deed, willingly putting in ure, avowing, &c. as true, ſimple, and given bona fide, ſhall forfeit, &c. And ſhewed, that one A. held of the Plaintiff 12 acres of cuſtomary Lands, and died ſeiſed, And that by the cuſtome of the Mannor, the Lord was to have for a Herriot, the beſt beaſt whereof his Tenant died poſſeſſed, and further ſhewed, that the ſaid A. in his life time, and a little before his death, being poſſeſſed of 30 Horſes, of the value of 200 Marks, gave the ſaid Horſes to the Defendant, with intent to defraud the Plaintiff, and other Lords of their Heriots, and that he went to the Defendants houſe to ſeiſe his Heriot, and the Defendant then ſtrained the ſaid Horſes, by reaſon of the Gift aforeſaid, for which the Action is brought. To which the Defendant pleaded, that the Plaintiff had ſeiſed one of the Horſes nomine Herioti: and as to the reſt he did demurre in Law. Mounſon Juſtice, was of opinion, that the Plaintiff ſhould recover the whole 200 Marks, although he was defrauded but of one Heriot onely: as if a man be indebted unto me in 20 l. and he makes ſuch a fraudulent Deed of his goods, of the value of 2000 l. although I be defrauded but of the 20 l. yet he ſhall forfeit the whole value of the goods ſo conveyed. Manwood Juſtice, was of opinion, that the Plaintiff ſhould recover the value of one of the Horſes; and the Gift by the firſt branch is void, as to the Plaintiff but for one

Debt.

Cuſtome.

Heriot.

one of the Horſes onely, and not for all the Horſes contained in the Gift, for no more then one Horſe was fraudulently given: And as by the firſt branch the Gift is void but for one Horſe, ſo by the ſecond branch the penalty extends but unto one Horſe, for the fraud extends but to one Horſe, and no farther. And this Action is not a popular Action, but extends onely to the party grieved. And of the ſame opinion was Dyer chief Juſtice, and he confeſſed the Caſe put by Mounſon Juſtice, where the Debtor of 20 l. makes a fraudulent Deed of his goods of 3000 l. &c. for the perſon of the Debtor is chargeable, and peradventure, goods of the value of 2000 l. may be put in execution for 100 l. but here the perſon is not charged for the Heriot. Barham Serjeant, the fraud goes to the whole (ſcil.) to all the Horſes: for although the Plaintiff is to have but one Horſe, yet he is to have the choice of all the Horſes, which of them he will have for the beſt Beaſt, and becauſe the choice goes to all the thirty Horſes; and by this fraudulent Gift, he is defrauded of his election, which of the Horſes he would have, therefore he ſhall have the value of the whole thirty Horſes. But Dyer and Mounſon ſaid to the Serjeant, ſet a price upon any of the thirty Horſes, as the beſt Horſe in your election, and demand the value of that Horſe as forfeit by the Statute, and then your election is ſaved to you.

19 *Eliz.* In the Common Pleas.

XI. Gregories *Caſe.*

IN the Aſſiſe againſt Arthur Gregorie and his wife at Warwick, before Dyer and Barham, Juſtices of Aſſiſe, the huſband made default, and the Aſſiſe was awarded by default: and the wife came and prayed to be received, and the opinion of the ſaid Juſtices was, that Receit lay in that Caſe; as in other caſes of Præcipe quod reddat; and therefore the wife was received. And now Dyer in Banco, demanded of his companions, the other Juſtices, if the Receit were well granted: And by Manwood and Mounſon, Juſtices, clearly the Receipt lies: For although that the Statute doth not give Receipt, but where the Lands in demand are to be loſt by ſuch default of the huſband, and in an Aſſiſe the Land ſhall not be loſt by the default of the huſband, but the Aſſiſe ſhall be taken by default, Yet becauſe the huſband and wife loſe their challenges to the Jury, becauſe the Aſſiſe is taken by default, It ſeemed to the Juſtices, and alſo to the Prejgnotories, that Receipt did well lie in this Caſe.

Aſſiſe.

Receit of the wife.

XII. 19 *Eliz.* In the Common Pleas.

IN an Action upon Eſcape, the Plaintiff is nonſuit: It was holden, that the Defendant ſhould not have coſts, by the Statute of 32 H. 8. Note the words of the Statute, i. (Upon any Action upon the Statute) for any offence or perſonall wrong, ſuppoſed to be done immediately to the Plaintiff, notwithſtanding this Action, is Quodam modo, an Action upon the Statute, i. by the equity of the Statute of Weſt 2. which gives expreſly againſt the Warden of the Fleet; yet properly it is not an Action upon the Statute: for in the Declaration in ſuch actions, no mention is made of the Statute, which ſee in the Book of Entries, 169, 171. And alſo here is not ſuppoſed any immediate perſonall wrong or offence to the Plaintiff: And an Action upon the Caſe it is not: for then the Writ ought to make mention of the Eſcape, and that it doth not here; and yet at the Common Law, before the Statute of Weſt. 2. An Action upon the Caſe did lie for an Eſcape: and ſo Dyer, Manwood, and Mounſon, coſts are not given in this Caſe. And by Manwood, upon the Nonſuit, in an Action upon the Statute of 8 H. 6. the

No coſts upon Nonſuit in an Action upon Eſcape.

Defendant ſhall not have coſts, for that is not a perſonall wrong, for the Writ is diſſeiſivit, which is a reall wrong.

Mich. 19 and 20 *Eliz.* In the Kings Bench.

Preſcription. IN Treſpaſſe for breaking of his Cloſe, the Defendant juſtified, to have a way by preſcription over the Land in which the treſpaſſe is ſuppoſed, for carrying of ſuch Tithes Uſque ad Rectoriam de D. from ſuch a place: And it was holden by Wray, and the whole Court, that the plea was not good; for in pleading ſuch a way, there ought to be ſet forth, terminus a quo, & terminus ad quem, And this word Rectory, which ought to be terminus ad quem, is incertain; for a Rectory is a thing which conſiſts of divers things, as Glebe, Tithes, &c. But he ought to have ſaid, the Parſonage Houſe, or other place certain: And afterwards it was ſhewed to the Court, that the ſaid Rectory did conſiſt onely of Tithes, and ſo there is not any place certain, as Parſonage Houſe, Barn, &c. to which the Tithes have uſed to be carried, for the Tithes have uſed to be let to farm to divers perſons, who have carried ſuch Tithes to their own houſes, and the Defendant is one of the Farmers of the Tithes. Wray, If your caſe be ſuch, you are to plead in this manner; That J. S. is ſeiſed in Fee of the Rectory of D. and that time out of minde, he, and all thoſe, &c. have uſed for them and theirs formerly to have a way to carry their Tithes from ſuch a place over the Land where, &c. unto ſuch a high way, and name a way, which is the next to the place where the treſpaſſe was done; the which cauſe the Defendant pleaded ſo accordingly to the direction of the Court.

Rectory, *quid.*

1 Vill. ab. 500.

Hillar. 20 *Eliz.* In the Common Pleas.

XIV. Wingfield *and* Seckfords *Caſe.*

Debt for Rent. IN Debt for arrerages of Rent upon a Leaſe for years, the truth of the caſe was, That before any arrerages incurred, the land Leaſed was evicted upon an Elder Title; The Defendant pleaded, that he owed him nothing: If now he might give in Evidence the ſaid eviction was the Queſtion, and it was the opinion of Dyer, Manwood, and Mounſon, that he could not, but he ought to have pleaded it ſpecially; and they denied the opinion of the Preignothories, who ſaid, that the Defendant ought to have pleaded the Eviction, and conclude Judgement if Action; and not rein luy doit, and the Court adviſed the Defendant to plead accordingly.

Pleadings.

Hillar. 20 *Eliz.* In the Common Pleas.

XV. Beamont *and* Deans *Caſe.*

Dower. IN Dower brought by the wife of Beamont, Maſter of the Rolls, in the time of E. 6. The Defendant ſaid, that he himſelf, before the Writ brought, did aſſigne a Rent of 10 l. per ann. to the Demandant, in recompence of her Dower, upon which the Demandant did demurre in Law; and the cauſe was, becauſe the Tenant had not ſhewed what Eſtate he had in the Lands at the time of the granting of the Rent, as to ſay, that he was ſeiſed in Fee, and granted the ſaid Rent; ſo as it might appear to the Court upon the plea, that the Tenant had a lawfull power to grant ſuch a Rent, which was granted by the whole Court, and the demurre holden good.

Hill.

Hill. 20 *Eliz.* In the Common-Pleas.

XVI. Hinde *and Sir* John Lyons *Caſe*.

IN Debt by the Plaintiff againſt the Defendant as Heir, he pleaded, That he had nothing by Deſcent but the third part of the Manor of D. The Plaintiff replyed, Aſſets; and ſhewed for Aſſets, that the Defendant had the whole Manor of Dale by Deſcent, upon which they were at iſſue: and it was given in evidence to the Jury, That the Manor was holden by Knights-ſervice; and that the ſaid Sir John, the Anceſtor of the Defendant, by his Will in writing deviſed the whole Manor to his Wife, until the Defendant, his Son and Heir, ſhould come to the age of 24 years; and that at the age of his ſaid Son, of 24 years, the Wife ſhould have the third part of the ſaid Manor for term of her life, and her Son ſhould have the reſidue: and that if his ſaid Son do dye before he come to his age of 24 years, without Heir of his body, that the Land ſhould remain to J. S. the Remainder over to another: The Deviſor dyed, the Son came to the age of 24 years; and the Queſtion was, If the Son hath an Eſtate-tayl, for then for two parts he is not in by Deſcent? And by Dyer and Manwood, Juſtices, here is not any Eſtate-tayl, for no tayl was to riſe before his ſaid age, and therefore the tayl ſhall never take effect; and the Fee-ſimple doth deſcend, and remain in the Son, unleſs he dyeth within the age of 24 years, and then the Entayl veſts with the Remainders over. But now having attained his ſaid age, he hath a Fee-ſimple, and that by Deſcent of the whole Manor, and a general Judgment ſhall be given againſt him, as of his own Debt: And an Elegit ſhall iſſue forth of the moyety of all his Lands, as well thoſe which he hath by deſcent from the ſame Anceſtor, as any elſe; and a Capias lieth againſt him. But Manwood conceived, That if general Judgment be given againſt the Heir by default, in ſuch a caſe a Capias doth not lie, although in caſe of falſe Plea it lieth. Dyer contrary; and the Writ againſt the Heir is in the Debet & Detinet, which proves, that in Law it is his own Debt: and he ſaid, that he could ſhew a preſident where ſuch an Action was maintainable againſt the Executors of the Heir.

S. C. 3 Leon. 64. 270.

Deviſes.

XVII. *Hil.* 20 *Eliz.* In the Common-Pleas.

A Man made a Leaſe of Lands by Indenture, to begin after the expiration of a Leaſe thereof made to one Duffam; and in an Action of Covenant brought by the ſecond Leſſee againſt the Leſſor, the Leſſor ſaid, That there was no ſuch Duffam in rerum natura, at the time of the ſuppoſed Leaſe made to Duffam: it was argued, That this Plea doth not lie for the Leſſor for he is eſtopped to ſay againſt the Indenture, That there is no ſuch Duffam, &c. And alſo if no ſuch perſon was, then the firſt Leaſe was void, and then the ſecond Leaſe ſhall begin preſently, which Manwood and Mounſon granted: and by Manwood, the Defendant ſhall be eſtopped by the Recital of the firſt Leaſe, to ſay, That there was no ſuch Duffam: And although the common Ground is, That a Recital is not an Eſtoppel, yet where the Recital is material, as it is here, it is otherwiſe, for here the ſecond Leaſe is to begin upon the expiration of the recited Leaſe; and therefore in this caſe it ſhall be an Eſtoppel.

Covenant.

Eſtoppell.

Mich.

XVIII. *Mich.* 20 *Eliz.* In the Kings-Bench.

Action upon the Stat. of 5 *Eliz.* for Perjury.

IN an Action upon the Statute of 5 Elizab. for a Perjury by three, the Plaintiffs declared, That the Defendant being examined upon his oath before Commissioners, If a Surrender was made at such a Court of a Copyhold to the use of A. and B. two of the Defendants? The Defendant swore, there was no such Surrender made, &c. Exception was taken to the Declaration, because that the certainty of the Copyhold did not appear upon the Declaration: for the Statute requires, that in such case the party grieved shall have remedy, so as it ought to appear in what thing he is grieved; quod fuit concessum per totam Curiam. Another Exception was taken, because the Action is given in this case to the party grieved, and it appeareth upon the Declaration, That the Surrender, in the negative depoſing of which the Perjury is assigned, was made to the use of two of the Plaintiffs onely, and then the third person is not a party grieved, for he claims nothing by the Surrender; and therefore for as much as the two persons grieved have joyned with the party not grieved, the Writ shall abate against them all, which Wray and Southcote granted.

Abatement of Writ.

XIX. 19 *Eliz.* In the Common-Pleas.

Action upon the Stat. of 13 *E.* 1. of *Winchester.*

IN an Action upon the Statute of Winchester 13 E. 1. against the men of the Hundred of A. Barham, Serjeant, took Exception to the Declaration, because it appeareth upon it, That the half year after the Robbery is not yet come; for by the said Statute it is ordained, That the Country have no longer time then half a year after the Robbery done, within which time facent-gree of the Robbery, or respondent the body of the Malefactors. And here the Action is brought within the half year: And for this cause the Declaration was holden to be insufficient by the whole Court. And the Lord Dyer spake much in commendation of that Statute being made for the publique benefit of the whole Commonwealth: for the Law intends when a Robbery is done, That if the Country will not pursue the Malefactors, that some of them are Receivors or Abettors of the Felons.

Manwood, Justice, said, When I was Servant to Sir James Hales, one of the Justices of the Common-Pleas, one of his Servants was robbed at Gadds Hill, within the Hundred of Gravesend in Kent, and he sued the men of the Hundred upon this Statute; and it seemed hard to the Inhabitants there, that they should answer for the Robberies done at Gadds Hill, because Robberies are there so frequent, that if they should answer for all of them, that they should be utterly undone. And Harris, Serjeant, was of Counsel with the Inhabitants of Gravesend, and pleaded for them, That time out of minde, &c. Felons had used to rob at Gadds Hill, and so prescribed, and afterwards by award they were charged: And note, That the Case was, that three men were robbed, and they three joyned in the Action against the Inhabitants.

20 *Eliz.* In the Common-Pleas.

XX. Colshil *and* Hastings *Case.*

AN Extent was sued forth upon a Statute-Merchant by Colshil against Hastings, for Lands in his possession in the County of Southampton: The

The Sheriff put the Plaintiff the Conuſee, in poſſeſſion of parcel of a Houſe and of Lands, and ſuffered Haſtings to continue in the reſt of the houſe, by reaſon whereof Haſtings kept the poſſeſſion of the whole, and held the Conuſee out; The Conuſee, to the intent that he might have full & perfect poſſeſſion of the whole, cauſed the Sheriff, that he did not return the Writ of Extent, upon which it is entred on the Roll, Quod Vice-Comes nihil inde fecit, nec miſit breve. Whereupon iſſued an Alias extendi facias, upon which the new Sheriff did return, That in the time of the old Sheriff, a Writ of Extent iſſued forth, &c. and that the ſaid Sheriff had extended the Lands, by reaſon whereof the new Sheriff could not extend them upon the new Writ. It was moved for the Conuſee, That the return was not good; For although that the Lands be extended by the firſt Writ, yet becauſe it is not returned, it is not any Execution in Law, nor could the Conuſee have an Aſſiſe, which Manwood Juſtice denied: Loare Preignotary, Our courſe is, when no return of ſuch Writ is made, to grant an Alias, at the prayers of the party, and to enter upon the Roll, That the Sheriff upon the firſt Writ, Nihil inde fecit, nec miſit breve. And that was taken by the Court to be a good and lawfull courſe in ſuch caſe; for upon ſuch ſurmiſe, that no Execution hath been done, and that upon ſuch entry on the Roll, an Alias Breve might be well awarded. And afterwards, this ſecond Writ of Extent was not filed by order of the Court: And note, that the new Sheriff was examined upon his oath by the Court of the Action, and he ſaid, that he made the return by the advice of Maſter Plowden, who told him, that he might ſafely return, that the Land was formerly extended, and although that the ſaid Extent was not returned; yet it is an Execution for the party. Manwood, Certainly, this is an inſufficient return: But, perhaps, Maſter Plowden did not know of this entry in the Roll, as aforeſaid, for now it appeareth upon Record, that no Execution was done. If this entry had not been, I ſhould well agree with Maſter Plowden, that the ſame is an Execution for the party, although it be not returned. Execution executed.

19 *Eliz.* In the Common Pleas.

XXI. Stewards *Caſe.*

THe Caſe was, A. ſeiſed of certain Lands in Fee, granted a Rent-charge out of the ſame to another, and afterwards aliened the Lands to a ſtranger. The Grantee in a Replevin, did avow for the Rent, and the other party pleaded, That nothing paſſed by the Deed: It was holden by the whole Court to be no plea, nor can any iſſue be joyned upon it, but the Plaintiff ought to have ſaid, That he did not grant by the Deed: For the ſame is a Rent newly created, and which had not his eſſence before the grant, and it cannot properly be ſaid, That nothing paſſed by the Deed, but not of a thing that is in eſſe, but of things not in eſſe, That he did not grant, is the moſt naturall iſſue, for a thing not in eſſe, non poteſt tranſire.

XXII. 19 *Eliz.* In the Kings Bench.

IN an Action upon the Caſe upon a Trover and Converſion to his own uſe per venditionem quibuſdam hominibus ignotis, the Defendant pleaded, That the goods were bailed to him, to bail over to J. S. to whom he had delivered them, abſque hoc, that he did convert them to his owne uſe, per venditionem hominibus ignotis. It was moved by Egerton, that that matter is not traverſable, Trover and Converſion.

verſable, quod Wray conceſſit, for the converſion to his own uſe, is the cauſe and ground of the Action, and not the ſelling of the goods, &c.

XXIII. *Mich.* 19 *and* 20 *Eliz.* In the Common Pleas.

Outlawry.

A Man was outlawed in the Court of Huſtings of London, and the Huſtings in which the Judgement of Outlawrie was given, was holden two weeks next after the laſt Huſtings; ſo as there was but two weeks between the two Huſtings; whereas commonly the Huſtings is holden but every three weeks, and now the Sheriffs of London were in doubt, if they might ſafely return the Outlawrie, without danger of an Action upon the Caſe brought againſt them by the party outlawed. It was holden by Dyer, and the whole Court, that they might, and might ſafely return the ſaid Outlawry: for the Lord Dyer ſaid, That there is a Record in the time of R. 2. whereby it appeareth, that in London they might hold their Huſtings every week, if they pleaſed, and afterwards he commanded Moſley and Cholpher, Secondaries, to return the Outlawrie, which was done accordingly.

19 *Eliz.* In the Common Pleas.

XXIV. Loveleſſes *Caſe.*

Debt upon Recognizance.

Loveleſſe Serjeant, brought a Scire facias upon a Recognizance, and had Judgement upon default, Quod habeat Executionem, and afterwards he brought an Action of Debt upon the ſaid Judgement, and exception was taken to the Action: for that he ought to proceed upon the Judgement given upon the Scire facias, and ought to ſue Execution according to the ſaid Judgement by Elegit, or Scire facias; but not by Capias; but the Exception was not allowed; For the Recognizance is a Judgement in it ſelf, and an Action of Debt will lie upon it; without any Judgement in the Scire facias; And Debt lieth as well upon the Judgement, as upon the Recognizance it ſelf; and ſo was the opinion of the whole Court.

XXV. *Eliz.* In the Common Pleas.

Brents *Caſe.*

THe Caſe was, That Robert Brent being ſeiſed of Lands in Fee, made a Feoffment thereof unto the uſe of himſelf and Dorothy his Wife for their lives; and if he do ſurvive his ſaid Wife, then to the uſe of him the ſaid Robert and ſuch a woman as he ſhould after marry, for the Joynture of ſuch Wife; the Remainder over to a Stranger in Fee: And afterwards (with the privity and aſſent of the Feoffor) he in the Remainder and the Feoffees joyn in a Feoffment to divers perſons, (Note, both Feoffments were after the Statute of 27 H. 8.) and afterwards Robert Brent the Husband levyed a Fine to the ſame uſes, and took a ſecond Wife, and dyed: The ſecond Wife, by the aſſent and commandment of the firſt Feoffees, after the five years paſt after the Fine, entered to raiſe the uſes mentioned in the firſt Feoffment limited to the ſecond Wife.

This Caſe was argued by all the Juſtices of the Court of Common-Pleas: and Mounſon, Juſtice, conceived, That the Entry of the Wife was lawful, and that without the aſſent or commandment of the Feoffees. An uſe may be limitted to one who is in eſſe, or in poſſe; and the ſecond wife here was in eſſe when the uſe was limited, and ſhe was alſo in poſſe; for by poſſibility

poſſibility the firſt Wife might die, and alſo by poſſibility the Feoffor might take to wife this woman. A Gift to one who is not in eſſe, or in poſſe, is void. A Gift to I. S. & primogenito filio ſuo, if he have a Son alive at the time of the Gift, he ſhall take jointly with his Father; but if not, yet after his death he ſhall take by way of Remainder. A uſe is nothing elſe but a truſt and confidence, and was not any Inheritance by the courſe of the Common Law, for no mention is made of Uſes in our ancient Books, when the Common Law greatly flouriſhed, as in the time of E. 1. and E. 3. and alſo Uſes are not ſubject to the Grounds of Law: And although divers Statutes have been made for the avoyding of divers policies for the gaining of Lands in Mortmain, yet the makers of the ſaid Statutes could not finde out any ſuch Conveyances to uſes. See the Statute of Religioſis, 7 E. 1. and ſee 29 H. 8. tit. Mortmain 39. There is a glance at Uſes 44 E. 3. 25. b. the words are, En ſoy demiſe, &c. and the Feoffees ſued Livery. And the firſt mention of Uſes in our Books is 30 H. 6. Br. Title to Uſes 49. and the ſame caſe Deviſe Fitz. 22. In the time of E. 4. Uſes were more frequent, for 5 E. 4. 6. divers caſes concerning Uſes are there put, &c. and afterwards 1 R. 3. a new Statute was made for the benefit of Ceſtuy que uſe: and afterwards the Statute of 4 H. 7. for the Wardſhip of Ceſtuy que uſe: and afterwards the Statute of 27 H. 8. which made an end of Uſes. Theſe Uſes at the firſt were of no value, but afterwards by continuance Communis error facit jus, ſo as they were taken and eſteemed as Inheritances: And they cannot be more fitly reſembled to any thing, as to Copyholds, which at begining were but Tenures at will, and were not known at the Common Law, but now they are in the ſame reputation in Law as Inheritances: and they are not guided by the Rules of the Common Law, but by the intent of the parties: which appeareth in this Caſe at Bar to be, That he who ſhould be the ſecond Wife of Robert Brent the Feoffor, ſhould have the Lands as ſupra: and therefore this Uſe ſhall riſe, and the Statute of 27 H. 8. ſhall draw the poſſeſſion after it.

Manwood, Juſtice: As to the commencement of Uſe, it hath been as long as mankinde hath been guided by Reaſon: and although no mention is made of Uſes in our ancient Books, yet that is no argument that Uſes have been but of late times. Uſes were not common, therefore were not at all, is a Non ſequitur. As long as Wills have been, Truſt and Confidence hath been; and alſo as long as Marriage hath been. See the Writ of Cauſa Matrimonii prolocuti: and ſee the Statute of Marlbridg, cap. 6. there is mention of falſa Feoffamenta: And note, by other words of the ſaid Statute there was a Truſt, but if was a falſe Truſt to deceive another; and therefore ſuch a miſ-ſhapen Truſt is not called a Truſt by the ſaid Statute, but a Colluſion. And Mr. Littleton ſaith, That Ceſtuy que uſe ſhall be ſworn upon Enqueſts, which was not enacted by any Statute, but practiſed and put in ure by reaſon of Common Law. And I have ſeen divers ancient Deeds of Uſes: and in ancient time, you ſhall not finde that any would purchaſe Lands to himſelf alone, but had two or three joynt Feoffees with him; and he who was firſt named in the Charter of Feoffment, was Ceſtuy que uſe, although that no Uſe was declared unto him upon the Livery, and ſo it was known by the occupation of the Lands. And the reaſon why no mention is made in our ancient Books of Uſes, is, becauſe men were then of better Conſciences then now they are, ſo as the Feoffees did not give occaſion to their Feoffors to bring Subpœna's to compel them to perform the Truſts repoſed in them.

As to that which hath been ſaid, That Uſes have taken their begining after the Statute of Weſt. 3. For before the ſaid Statute, if a man had made a Feoffment in Fee without declaring any uſe, it ſhould be to the uſe of the Feoffee, becauſe there is a ſufficient conſideration betwixt the Feoffor and

and Feoffee to raiſe the uſe, i. the Seigniory created by the Law betwixt them: but now by the ſaid Statute ſuch conſideration is taken away; and then upon ſuch Feoffment, without conſideration or declaration of uſe, it is to the uſe of the Feoffor himſelf, the ſame is no reaſon againſt them: for although that an Uſe implyed was not before the ſaid Statute of Weſt. 3. yet a Uſe expreſſed was; and if before the ſaid Statute the Feoffor had declared an uſe, the ſame had been good: as at this day, a Gift in tayl, or a Leaſe for life, is made to another uſe, yet notwithſtanding that the Law doth create a Tenure upon the Leaſe or Gift, yet the Uſe expreſſed ſhall be good. And although Uſes are of ſuch Antiquity, yet they are not directed by the Rules of the common Law, but by the Will of the Owner of the Lands: For the Uſe is in his hands as clay is in the hands of the Potter, which he in whoſe hands it is may put into what form he pleaſeth: And notwithſtanding that now the poſſeſſion be executed to the Uſe, yet the property and quality, as abſtracted from the poſſeſſion, ſhall not be drowned in the poſſeſſion: and ſo for as much as Uſes were by permiſſion of Law guided at the wills of the parties, ſo alſo ſhall be the poſſeſſions: And ſo becauſe, That an uſe, as abſtracted from the poſſeſſion, might have been well limited to the Wife which ſhould be, notwithſtanding that at the time of ſuch limitation ſuch a one was not in eſſe, in the ſame manner it ſhall be now, when the poſſeſſion is preſently executed to the uſe: and ſo in this caſe, the ſecond Wife ſhall be capable of this uſe, according to the will and direction of the Owner. If a Feoffment in Fee be made to the uſe of B. for life, and if A. before ſuch a day ſhall pay 10 l. to the Feoffee, then to the uſe of the ſaid A. for life, the ſame is a good uſe to begin upon the ſaid condition; and yet if it had been limited in poſſeſſion, it had been otherwiſe: And that an Uſe may begin upon a contingency, ſee the caſe 27 H. 8. 5. A Covenant is made by Indenture betwixt A. and B. that the Son of A. ſhall marry the Daughter of B. upon which B. pays 100 l. to A. and the ſaid A. doth covenant, that if the ſaid marriage doth not take effect, that then the Feoffees of the ſaid A. ſhall ſuffer the ſaid B. his Executors and Aſſigns, to have the iſſues and profits of certain Lands, until B. his Executors and Aſſigns, ſhall be contented and ſatisfied of the ſum aforeſaid by the ſaid A. his Executors or Aſſigns, there, if the marriage doth not take effect, upon ſuch contingent, the uſe ſhall riſe to B. And ſee 30 H. 8. Br. Feoffs to Uſes 50. A. covenants with B. that when B. ſhall enfeoff A. of the Manor of D. then B. and his Heirs ſhall be ſeiſed of the Manor of D. to the uſe of the ſaid A. and his Heirs: Now if A. enfeoffeth B. ut ſupra, they, &c. vide librum. And here in our caſe, the ſecond Wife doth not hold jointly with her Husband, for their Eſtates do not begin together, for the Husband is in of his ancient Eſtate which he had during the firſt marriage, notwithſtanding the words of limitation to the ſaid Husband and his ſecond Wife, but ſhe ſhall take by way of Remainder.

Harper, Juſtice. Uſes began about 18 E. 2. after which time there was ſuch a general liking of them, that they were anew uſed, but they did not come into common practice before the time of King Henry the ſixth, when the great contention fell out betwixt the two great Houſes of York and Lancaſter, at which time Uſes were in great eſtimation for the ſafety of Inheritances. Afterwards, Uſes by practices became miſchievous, and prejudicial to the publique Juſtice of the Realm, and to many particular perſons; for ſome, timentes implacitari, conveyed their Lands ſecretly to uſes, ſo as he who had right knew not againſt whom to bring his Action: and for that, divers Statutes have been made to enable the Subject to implead the perſon of the profits, 4 H. 4. 7. 11 H. 6. 4. 1 H. 7. And as to the making of the Statute of 27 H. 8. the truth is, That the King was diſpleaſed for the loſs of Wardſhips, and other injuries done to him; for which cauſe he

complained

complained to the Juages of the defect of the Law in that caſe who thereupon ſhewed unto the King the cauſes of thoſe injuries and loſſes to the King; and further ſhewed to the King, That if the poſſeſſion might be joyned to the uſe, all would go well, and all the injuries, wrong, and loſs, which came to the King by reaſon of ſuch Uſes, Wills, and ſecret Feoffements, would be avoyded: For which the King commanded his Counſel to frame a Bill to that purpoſe, and preſent it to the Houſe of Commons in the 24 year of his Reign, but it was then rejected; and the King at that time would have been contented, that the fourth part of the Land onely ſhould deſcend: and from that time the King ſtayed further proceedings in the ſaid cauſe until 27 H. 8. at which time it took effect: And their cure was to pen the Statute ſo preciſely, that nothing ſhould be left in the Feoffees, but that the whole Eſtate ſhould be executed by the Statute, ſo as the ſaid Statute did utterly take out all from the Feoffees. Whereas it hath been ſaid, That a Uſe hath been as long as any Marriage hath been, and ſo conceived upon the Writ Cauſa Matrimonii prolocuti, the ſame is not any reaſon; for in that Caſe there is not any Confidence or Truſt: for if the marriage doth not take effect, the woman ſhall have her Writ de Cauſa Matrimonii prolocuti. In Conveyances we are to reſpect two things, the form, and the effect of it; and in all caſes where the form and the effect cannot ſtand together, the form ſhall be rejected, and the effect ſhall ſtand. A Leaſe for life is made to a Feme ſole, ſhe takes Husband, the Leſſor confirms to both of them; the Husband cannot take any Eſtate preſently according to the words of the Confirmation; but becauſe the Will of the Leſſor is, that an Eſtate ſhall accrue to the Husband, he ſhall have it as the Law will, by way of Remainder. So Lands are given to an Abbot and a ſecular man, the form of the words purport a joynt Eſtate, but that by Law cannot be; and therefore they ſhall take as the Law will, rather then not at all. In our caſe here, The limitation of the Uſe cannot be purſued preciſely according to the words, which are, viz. If the Husband overlive his ſaid firſt Wife, then to the uſe of the ſaid Husband and his Wife which ſhall be; which in words is a joynt Eſtate: and therefore the words ſhall be conſtrued, After the death of the firſt Wife, unto the uſe of the Husband until he marrieth, and afterwards to the uſe of him and his ſecond Wife, in which caſe they ſhall take joyntly.

Dyer, chief Juſtice; As to the begining of Uſes, he conceived that the ſame was immediately after the Statute of Mortmain, at which time all their ſhifts then in practice were found out: which ſee, the Statute of Mortmain, 7 E. 1. Stat. de Religioſis: for which cauſe they were after driven to finde out other ſhifts not provided for by the Statute, which were eſpyed by the making of the Statute of 15 R. 2. cap. 5. and in that Statute theſe words, Behoof and Uſe are uſed; which is the firſt place thoſe words have been uſed in our Law, and yet long time before that Statute Uſes had been in practice, as appeareth in the Exchequer, 34 E. 3. the which in the time of Queen Mary, when the ſaid Record was ſhewed in the Exchequer to the Juſtices, the effect of which Record was, That Walter de Chirton, who was Cuſtomer of the King, became indebted to the King in the ſum of 18000 l. and with that the Kings mony had purchaſed in the name of his friends, to defraud the King, many Lands, and took the profits of them; thoſe Lands ſo purchaſed were extended to the uſe, and for the King, in payment of his Debt, as well as if Walter de Chirton himſelf had been ſeiſed of them, and that by the advice of the Chancellor and the chief Juſtices. Now Uſes by tract of time have grown in credit, ſo as Ceſtuy que uſe have been ſworn in Inqueſts, and by the Law they might juſtifie the maintaining of their Feoffees when they had been impleaded, which they could not have done if they had not more intereſt in the Lands then ſtrangers:

and they (Uses) have been in such reckoning and account since, that an Use hath obtained the name of an Inheritance, and is now reputed amongst the Estates of Lands in our Law; and therefore we say in Speeches, and in penning of Statutes, Estates in possession, and Estates in use: and a Use cannot be limited to Parishioners, no more then the Land it self; so as there is a great affinity betwixt the words, Lands and Use. It is to be granted, That the Statute of 27 H. 8. doth devest all out of the Feoffees, yet it doth not devest it before that the use be vested in Cestuy que use; for the words of the Statute are, That the possession shall be executed in such manner, quality, and degree, as was the Use; therefore the vesting of the Use ought to precede the execution of the possession to it. And he was of opinion, That this future Use in the principal Case limited to the second Wife did remain in the Feoffees at the first, but that they had destroyed it by their Feoffment; for the second Wife at the time of the Feoffment was not known, and therefore it shall not now accrue: And he was also of opinion, That this limitation to the second Wife was void at the begining; for the second Wife was not a person able to take, when the Estate and Use limited to the first Wife was determined, and therefore she shall not take at all: and if such an Estate had been limited in possession, it should not have vested, no more then now.

Mounson, Justice; When the Feoffor and the Feoffees joyn in a Fine of that Land, within which the use in future is wrapped, be conceived, That the Use being in abeyance and consideration of the Law, could not be touched by the Fine. It is to be confessed, That an Use may be discontinued: See 4 H. 7. 18. A Feoffment made to the use of A. for life, and after to the use of B. in tayl, &c. A. makes a Feoffment in Fee, and dyeth, the same is a discontinuance of the other Uses: and see 27 H. 8. 29. And in our Case, the Use might arise without any Entry of the Feoffees; for the Use is not discontinued, but the Feoffees are barred by the Fine: And he was also of opinion, That this Use might take effect without any Entry, and take effect according to the limitation.

Manwood, This Estate which is limited in use to the second Wife, because it cannot vest in her because not known, the Feoffees are yet content with it, and this Use is to grow out of their Estates at the seasonable time: When when they joyn in a Feoffment, their Estate which was the root of the Conveyance, and the Uses which are the branches, spring not till she dyeth; and therefore if the Estate of the Feoffees, which is the root of the Uses, be destroyed by alienation of the Land before the Uses have their being, as in our Case it is, because that then the second was not known, no use can afterwards rise, for by the Feoffment they are destroyed, and also every possibility of them. But if the Uses had been in esse, so as the persons to whom they are limited are known, then the Statute shall execute the possession to such uses. And as to that which hath been objected by my Brother Mounson, That the Law shall keep and preserve the Use, and that notwithstanding any thing done by the Feoffees at its due time it shall rise: That cannot be; for the Statute of 27 H. 8. doth not speak of such Uses as this in our Case, but of such Uses onely, of which one may say, such a use is limited to such a person, and such to such a person, &c. and such uses are onely executed by the Statute. It may be demanded, What Estate the Feoffees have in the Lands until such uses be executed? It may be answered, A Fee-simple determinable, as the Lord hath when he entereth upon his Villein Donee in tayl: And I conceive, That this use was not in Custodia Legis, quia de minimis non curat Lex: and the use was such a thing of which the Law took no knowledg; and in case of an Estate in possession, such an use in abeyance should be bound: As a Lease for life unto A. the Remainder to the right Heirs of B.

A. suffers

A. ſuffers a common Recovery in the life of B. who afterwards dyeth, and afterwards A. dyeth, the Heir of B. is bound, for he had not right at the time of the Recovery. This Fine levyed by the manner ſhall not deſtroy the uſes limited to the ſecond Wife; for, as to the Feoffees, they have nothing to do with the Lands to transfer any Eſtate againſt the former limitation; for the Statute leaves nothing in the Feoffees, but veſts all in Ceſtuy que uſe, and that which cannot veſt in him to whom it is limited, ſhall return to the Feoffor: As if I make a Feoffment in Fee to the uſe of my ſelf for life, and after to the uſe of my ſecond Wife, all the Fee is now in me, and when I take a ſecond Wife, then the Feoffees ſhall be ſeiſed to the uſe of ſuch Wife in Remainder for her life: but in the Caſe at Bar, the Feoffees, at the time when this ſecond Wife was in eſſe, had not any thing in the Lands, for they had departed with all their Intereſt before by their Feoffment and Fine.

Note, That by the firſt Feoffment the uſe was limited to D. the firſt Wife of the Feoffor, for term of her life, the Remainder in tayl to A. Brent, the Remainder in fee to one Broughton, and all theſe uſes were executed by the Statute; but theſe perſons were not parties to the Livery, but onely the Feoffees, which had not any thing: Then when they make their Letter of Attorny to make Livery of ſeiſin (not being ſeiſed of the Land) the Attorny onely is a Diſſeiſor, and ſo nothing paſſed from the Feoffees, if any right had been in them: and for another Reaſon nothing paſſed by this laſt Conveyance out of the Feoffees, for the parties to the latter Conveyance had notice of the uſe, and ſo it appeareth by the ſecond Indenture, the which makes mention of the firſt uſes, &c.

Dyer, Here in our Caſe, The Founders of theſe uſes, i. the Feoffor and the Feoffees, have an intent to overthrow theſe uſes, for at the common Law the Feoffees might do it of themſelves; As if the Feoffees had made a Feoffment in fee in conſideration of mony to others who had not notice of the uſes, now the uſes are gone, and the ſecond Feoffees in ſuch caſes were ſeiſed to their own uſes. I well know, That by this Feoffment all is deveſted out of the Feoffees, which might veſt in the perſon to whom the uſe is limited; but here this uſe which was limited to the ſecond Wife, could not upon the limitation of it veſt in any perſon; and therefore it ſhall remain in the Feoffees who are put in Truſt with it, and therefore have intereſt in the Lands until all the Truſts be performed: and therefore the ſecond Wife was adviſed by her Councel to make her Entry in name of the ſurviving Feoffee, and the intereſt which the Feoffees have in the interim, until the execution of all the uſes, is a Fee-ſimple determinable; for the whole intereſt is not deveſted or driven out of the Feoffees until the whole Truſt be accompliſhed, i. until all the uſes limited upon the Feoffment are executed, and have their full perfection.

And whereas it hath been alledged on the other ſide, That upon the ſecond Feoffment nothing paſſed out of the Feoffees, for which it ſhall not be ſaid in Law their Livery, but that the Attorny ſhall be ſaid the ſole Diſſeiſor; As to that I conceive, That whatſoever was loſt in the Feoffees paſſed by that Livery. If he in the Reverſion upon an Eſtate for life makes a Charter of a Feoffment, and a Letter of Attorny to make Livery of ſeiſin without words ad expellendas omnes, &c. if Livery be made by force thereof, the Fee-ſimple ſhall paſs: And he cited a Caſe which was argued before all the Juſtices of England, reported by himſelf 2 and 3 Ma. 131. Divers Leaſes for years were made of the Demeans of an Abby, after which the Reverſion was granted to the Counteſs of Richmond for life, after which King Edw. 6. granted the Reverſion in Fee to the Earl of Warwick

Warwick, who made a Feoffment of all to certain perſons, to the uſe of his eldeſt ſon and his wife for her Joynture, with a Letter of Attorney to make Livery and ſeiſin; the Attorney made Livery accordingly, and by that Feoffment and Livery, it was adjuged, that the Fee-ſimple did paſſe: So in our Caſe, upon this ſecond Feoffment, a Diſſeiſin is done to D. the firſt wife, and yet the right of the Feoffees doth paſſe thereby; and although it ſhall not be taken in Law their Livery, yet it ſhall be adjudged their confirmation, becauſe they have joyned in the Deed, and that ſhall binde their right to eſtabliſh the ſame in the new Feoffees, as if the Diſſeiſee joyn in a Feoffe by Deed with the heir of the Diſſeiſor: And as to that which hath been objected, that becauſe at the time of the Feoffment, the Feoffees had not any thing, &c. and therefore nothing ſhall paſſe: and they have likened to the Caſe, where the Father is diſſeiſed, and the ſon and heir doth releaſe to the Diſſeiſor, the ſame ſhall not binde the heir after the death of his Father: The ſame is not like our Caſe; for there is a great difference betwixt a Releaſe and a Feoffment; for if the ſon diſſeiſe the Father, and maketh a Feoffment in Fee in the life of his Father, notwithſtanding that he had not any right at the time of the Feoffment, yet he is bound.

Trin. 29 *Eliz.* In the Kings Bench. *Rot.* 342.

XXVI. Thurkettell *and* Teys *Caſe.*

IN Debt by John Thurkettell againſt Edw. Tey, and Mary his wife, Executrix of Robert Thurkettell, the Caſe was, That Agnes Thurkettell, mother of Robert, the Teſtator, deviſed certain Lands to Robert, and afterwards deviſed 40 l. to the Plaintiff, John, upon condition, that the ſaid John, Cum requiſitus eſſet acquietaret, & retaxaret prædict. Roberto omnes actiones reales & perſonales, querelas, &c. prædict. 40 l. per dict. voluntat. legatis tantummodo exceptis; Agnes died, Robert made two Bonds to John, The firſt was endorſed to pay 20 l. parcell of the ſaid Legacie, within a year after the death of the ſaid Agnes, ſo as the Plaintiff releaſe according to the Will of the ſaid Agnes. The 2d Obligation was with the ſame condition, to pay 20 l. reſidue of the ſaid Legacie within two years after the death of the ſaid Agnes, upon condition to releaſe, ut ſupra, and all this matter was pleaded in barre; And further, That Robert required the ſaid John to make the Releaſe, &c. which he refuſed, and they were at iſſue upon the requeſt, and it was found for the Plaintiff; i. Quod dict. Robert. non requiſivit, &c. upon which Verdict Judgement was given for the Plaintiff; upon which the Defendants brought Error, becauſe it appeareth upon the Record here, quod Billa prædict. proſecuta fuit infra duos annos poſt mortem dict. Agnet. & ſic ante diem ſolutionis: For the ſecond Bond, ſee 46 E. 3. 28. by Finchden and Perſay, and ſee there, by Perſay, That if my Writ be brought before the day of payment, and doth depend in ſuit till after the day of payment, that my Writ is made good; for at all times the Defendant was my Debtor. And afterwards in the principall Caſe the Judgement was affirmed in the Exchequer-Chamber: and note, that the day of paiment did incurre, pendent the Writ.

29 *Eliz.* In the Exchequer.

XXVII. Lightfoot *and* Butlers *Caſe.*

IT was ſaid in this Caſe by the Sollicitor Generall, That if one holdeth of the Queen, as of her Mannor, he ſhall not have the priviledge of the Exchequer for that cauſe; But if the King grants Tithes, and thereupon reſerveth a Rent, nomine decimæ, and a Tenure of him, there he ſhall have the priviledge: The principall caſe was, That one of the parties claimed the Lands in queſtion as his Freehold, but holden of the Queen as of ſuch a Mannor; And the other claimed it as Copy-hold, holden of the ſame Mannor; And the Freeholder did ſuggeſt in the Exchequer, That the demands of the Mannor are not indifferent. Clark Baron, If it be ſo, this Court ſhall have juriſdiction. Manwood, If the matter paſſe againſt you wrongfully, wherefore may you not have an Aſſiſe? And the Caſe of Beaumorris was cited (but I remember not to what purpoſe) i. The Maior and Communalty of Beaumorris, were Patrons of the a Chantry; and they and the Chantry Prieſt made a Leaſe for years by Indenture, in the end of which was this Clauſe, In cujus rei teſtimonium, tam the Prieſt, quam the Maior and Communalty have put their common ſeal, and it was moved that there was not any ſeal for the Prieſt, for he could not have a common ſeal with the maior and Communalty. Clark, Twentie men may ſeal with one ſeal, and they may alſo all ſeal with one ſeal upon one piece of Wax onely, and that ſhall ſerve for them all, if they all lay their hand upon the ſeal together. Manwood, They may all ſeal with one ſeal, but upon ſeverall pieces of Wax. Gent, When many are parties to a Deed, the words are Sigilla omnia; which cannot be aptly ſaid in this Caſe, where all ſeal upon one piece of Wax.

29 *Eliz.* In the Exchequer.

XXVIII. Barnes *and* Smiths *Caſe.*

EManuel Barnes, Executor of Barnes, late Biſhop of London, brought Debt for arrerages of Rent, reſerved upon a Leaſe for years, of certain Wynes demiſed to Smith, i. Wynes called Argil, and Wynes called Greenbourn; and it was againſt the Executors of Smith. The Defendant pleaded, as to parcel non detinet, and as to the other parcell of the arrerages, That in the Indenture of Leaſe, there is a Covenant, That if it ſhall happen, that the ſaid Leſſee be hindred, Quo minus Mineriis, præd. gaudere poſſit; That then ſo much Rent ſhould be deducted anno, to the value of the Wyne, that he could not enjoy, &c. And he ſaid, that he was hindred, Quo minus gaudere potuit Mineriis prædict. &c. and iſſue was joyned, that the Leſſee could not enjoy, &c. and it was found for the Plaintiff. It was moved by Coke, in arreſt of Judgement, That here is not any place ſhewed, where theſe Wynes were, ſo as it doth not appear from what place the Viſne ſhould come; as if in an Action (as here) the Plaintiff declares of a Leaſe made of Lands, called R. in ſuch a County, the ſame is not good. The iſſue here is, Non potuit fodere in prædict. Minera de Greenbourn, for the ſpace of ſeven years and an half, from whence ſhall the Viſne come for triall of it? Not from Durham where the Leaſe was made; for no affinity or neerneſſe is betwixt the place where the Leaſe was made and this iſſue. But if the iſſue had been, That the Leſſor had not any thing in the Wynes at the time of the Leaſe, that might be tried, where the Leaſe was made: Another

erception was, becauſe that the plea is; Quod non potuit fodere, in 3. 4, 5, 6, 7, 8. dimidio, 10, & 11. and that appears to be ſeven years and a half, and the Jury finde that he could not digg, per ſpatium ſeptem annorum tantum, without ſpeaking of the half year, and ſo they have not given a full Verdict: And as to the firſt Exception, it was ſaid, If a thing be alledged in pleading which is iſſuable, and there is not laid down any place of it, although that no iſſue be joyned upon it, yet becauſe he hath prevented the other of his plea to it, Judgement given in ſuch caſe ſhall be reverſed: and ſo it was rated, betwixt Matthew and Stanſham: So upon the Statute of Uſury, the Informer charged the Defendant, that by way of corrupt bargain he hath received ſo much, and doth not ſhew the place, although no iſſue was joyned upon it, but they were at iſſue upon another point, yet if Judgement in ſuch caſe be given, it ſhall be reverſed. And in all Actions upon the Caſe, where Requeſt is neceſſary, and the Plaintiff ought to alledge it; the place of the Requeſt muſt be ſhewed: and he ſaid, That ſuch iſſue was to be tried where the Wynes Leaſed are; and here no place is alledged, where the Wynes are, but onely in the County of Durham; and yet a Viſne of the City of Durham hath tried the iſſue, which ought not to have been, but the Viſne ought to have come, De corpore Comitatus. Clark Baron, If the iſſue be joyned upon taking of the profits, it ſhall be tried where the land is, but Non debet, or detinet, where the Leaſe is made. Coke, The iſſue is, Non potuit fodere, and that is locall; therefore it ſhall be tried where the Wynes are. Manwood, Non potuit fodere, Non potuit gaudere, are not locall; but Non fodit, non gaviſus fuit, is locall, and ſhall be tried where the Wynes are: and here it is not ſhewed how he was hindred to digg, &c. and the iſſue is to be de poſſeſſ. non de actu. Tanfield, as to that which Coke hath ſaid, That the Viſne in this Caſe ſhall come, de corpore Comitatus, the ſame is not ſo, for ſuch a Viſne ſhall never be, but where the iſſue is upon, Nul tiel vill hamlett, or place known: In another Caſe, the triall ſhall be, de corpore Comitatus, as in a falſe impriſonment the Defendant juſtifies, that the common voyce and fame was, that the Plaintiff comitted ſuch a Felony, &c. The Plaintiff traverſeth the common voice and fame, there the Viſne ſhall be, de corpore Comitatus, 11 E. 4. 4, and 5. and ſee alſo 25 Eliz. the Caſe of Gynne and Conſtantine reported now in Coke, 6 part Dowdales Caſe. 48. As to the defect in the verdict for the half year, the Record is not ſo; for the Record is, dimidio anni decimi, & undecimi, and ſo two half years make a whole year; and ſo there is but ſeven years in which the diſturbance is ſuppoſed to be done. See as to the Viſne, de corpore comitatus, 22 E. 4. 4 Viſne 27. Another Exception was taken, becauſe that the Declaration is, That the Leaſe was made at Durham, in Comitatu Dunelm. and doth not ſay alſo in Selberg, for ſuch is the name of the County Palatine; but to that it was ſaid, That every Writ of Execution which goes into the County Palatine, is directed Epiſcopo Dunelmenſi, & Cancellario ſuo, quod det in mandatis Vice-Com. ſuo, &c. And Durham was called Selberg in ancient times, and the name of the County Palatine there, is commonly Dunelm. & Selberg. and their pleas there entred; Placita coram Juſticiariis de Dunelm. & Selberg. but the ſame is amongſt themſelves onely, and all directions from hence to them are Epiſcop. Dunelm. without mention of Selberg, and a Preſident was ſhewed to the Court to that purpoſe and intent. Manwood, Levied by diſtreſſe, and iſſint rein arere ſhall be tried where the Leaſe was made: Clark, That is true, for by the (Iſſint) the plea before is waved: And ſee 8 H. 5. 10. Where an iſſue is to be tried in Lincoln, or ſuch a town, which is a Franchiſe, the Venire facias ſhall be of Lincoln, &c. and not de vicineto de Lincoln; for then the Jury ſhall be as well of the County adjacent, as of Lincolne it ſelf, which the Sheriff of Lincoln cannot do: but a Venire facias de ſuburbiis of Briſtow was awarded good: And if in the caſe at Bar, the Defendant had

pleaded,

pleaded, that the Defendant had entred into part of the Mynes, and ſo ſuſpended his Rent, upon which they are at iſſue; that, by Manwood, ſhall be tried by a Jury, de corpore Comitatus. The iſſue here is, If the Defendant might enjoy thoſe Mynes, Secundum veram intentionem dimiſſionis prædict. and that is referred to the Deviſe which was made at Durham, and there it is well triable. And afterwards, at another day it was holden, That all the iſſues are Jeofailes; but as to the want of place, the ſame was holden to be a materiall Exception. See the Caſe of Mynes, Plowd. 337. Exception was taken to the Information, becauſe it is not laid down there in what Town or Hamlet Newlands lay; and it was holden, the ſame had been a materiall Exception, if the Defendant had demanded upon the Information in which caſe there is no triall by Jury, &c. and he ſaid, Miſnoſmer ſhall be tried where the Writ is brought, &c. So Ne unque adminiſter as Executor &c. Manwood. Here the Leaſe is ſaid to be made at Durham, in a place certain; if now there be not any other locall thing ſaid which might draw the triall elſewhere, it ſhall be tried at Durham where the Leaſe is made: An Infant makes a Leaſe for years, rendring Rent, and afterwards re-enters, and avoids his Leaſe by reaſon of his nonage, and Title is made againſt him by the Leaſe, upon which he pretended nonage, it ſhall be tried where the Leaſe was made, and afterwards Judgement was given for the Plaintff.

Paſch. 30 *Eliz.* In the Kings Bench.

XXIX. Roſſe *and* Morrices *Caſe.*

EDward Roſſe was Plaintiff in a Replevin againſt Edward Morrice, and George Manly Defendants, who made Conuſance, as Bailiffs to Jerom Weſton. The Plaintff declares, of the taking of two Geldings, 20 Decemb. 29 Eliz. at Nayland, in the County of Suffolk, in a certain place called Nayland-Court-Meadow. And the Conuſance is that the place where was the Freehold of the ſaid Jer. Weſton, &c. The Plaintiff in bar of the Conuſance ſhewed, That long time before, Sir Chriſtopher Danby was ſeiſed of 30 acres of Meadow in Nayland, whereof the place where, &c. and Leaſed the ſame by Indenture to Thomas Calton, 19 Maii, 31 H. 8. Habendum from the Feaſt of the Annunciation, 1553. for the term of 45 years; Who, 1 E. 6. aſſigned his Intereſt to Edw. Roſſe, the Plaintiffs Father, who, 1 Maii, the ſaid 1553. entred, and 11 Eliz. granted his Intereſt to Bamford and Maſcal, who entred and were poſſeſſed. Sir Chriſtopher Danby died ſeiſed of the Reverſion, 13 Eliz. and the ſame deſcended to Thomas Danby his ſon and heir: 14 Eliz Maſcal died, Bamford, 15 Eliz. granted it to the Plaintiff, Habendum from the 17 of March 1583. for three years, which expired 26 Eliz. Bamford entred, and afterwards Thomas Danby granted the Reverſion to Edw. Rockwood in Fee, to which the ſaid Bamford Attorned; and the Plaintiff by force of the ſaid Leaſe, put in his Cattell, &c. The Plaintiff, Replicando ſaid; That long time before that Danby had any thing, Jeofry, Lord Scroop, had iſſue of his body, Henry, Lord Scroop, and died; And that one John Guntwarby was ſeiſed of the ſaid Manor of Nayland, whereof, &c. in Fee, and by his Charter, 25 E. 3. gave to the ſaid Henry, Lord Scroop, the ſame, Et hæredibus corpore ſuo exeuntibus, who had iſſue Stephen, who entred, and died ſeiſed, having iſſue John, who entred, and died ſeiſed, having iſſue Thomas, who entred, and 3 H. 7. ſuffered a Common Recovery to the uſe of himſelf and his heirs, The Recoverers enfeoffed, Thomas ſeiſed alſo of many other Lands, and had iſſue, Ralph, Jeofry, Alice, Elizabeth and Margery, and afterwards died ſeiſed. Ralph, Lord Scroop entred, and thereof did enfeoff divers perſons

unto

unto the uſe of himſelf, and Eleanor his wife, for their lives, and the heirs males of the ſaid Ralph; and afterwards, the ſaid Ralph being poſſeſſed of the ſaid Charter of entail made, ut ſupra, by Guntwardy, 7 H. 8. Deviſed that the Feoffees ſhould be ſeiſed of the ſaid Manor of Nayland to the uſe of himſelf, and Eleanor his wife, for their lives; and if they died without iſſue of the body of the ſaid Ralph, the ſaid Jeofry then living, that then the Feoffees ſhould be ſeiſed to the uſe of the ſaid Jeofry, (being his Uncle) for his life, and after his deceaſe, ad uſum Rectorum hæredum in perpetuum ſecundam antiquam Evidentiam inde ante factam; with an averment, that the ſaid Ralph, at the time of the ſaid Deviſe, and of his death, was poſſeſſed of the ſaid Charter of Entail made by the ſaid Guntwardy: and that the ſaid Charter was the moſt ancient Evidence of the ſaid, concerning the ſaid Manor. Ralph died without iſſue poſſeſſed of the ſaid Charter by which the Feoffees were ſeiſed of the ſaid Manor of Nayland to his uſe for life, and after to the uſe of the ſaid Jeofry for life, and after his deceaſe, of the right heirs of the body of Henry, Lord Scroop, lawfully begotten, by reaſon of the ſaid Deviſe, and the ſaid Charter, and of the reſidue of the Manors, to the uſe of the ſaid Jeofry and his heirs; Eleanor died, after whoſe deceaſe, the Feoffees were ſeiſed of the ſaid Manor of Nayland, to the uſe of the ſaid Jeofry, right heir of the ſaid Henry, Lord Scroop, of his body begotten, and of the other lands to the uſe of the ſaid Jeofry in Fee: Jeofry died without iſſue, by which the Feoffes were ſeiſed to the uſe of the ſaid Alice, Elizabeth, and Margery, Coſins and heirs of the body of the ſaid Henry Scroop, &c. and of the heirs of the bodies of the ſaid Alice, Elizabeth, and Margery, lawfully begotten, by reaſon of the ſaid Deviſe and Charter, as to the ſaid Manor of Nayland, and of the other Manors to their uſe in Fee; And afterwards the ſaid Alice took to husband, James Strangways, who had iſſue, Thomas: Elizabeth took to husband, Fitz Randolph, who had iſſue Elizabeth, Dorothy, Agnes, Alice: Margery took to husband, Danby, who had iſſue, Sir Chriſtopher Danby, named in the Bar, and afterwards all the ſaid husbands and their wives died, by force of which the ſaid Feoffees were ſeiſed of one part of the ſaid Manor of Nayland in three parts to be divided, to the uſe of the ſaid Thomas Strangways; and of another part, to the uſe of the four daughters of the ſaid Elizabeth, and her husband Fitz-Randolph, and of another ſuch part to the uſe of the ſaid Chriſtopher Danby, and of their heirs in Tail; and of the other lands to the uſe of them in Fee, in degree of Copercinary; Elizabeth, the eldeſt daughter of Fitz-Randolph, took to husband Shirley, Dorothy her ſiſter, took to husband, Eſhe: Agnes took to husband, Maynel, and Alice took to husband Draufield. Thomas Strangways had iſſue, James, and died. And afterwards partition was made, by which, to James Strangways were allotted lands in Kent, and agreed that the Feoffees ſhould be ſeiſed of the ſaid lands to the uſe of the ſaid James and his heirs, and to no other uſe; To Sherley, and Elizabeth his wife, lands in Eſſex were allotted, and agreed upon the partition, that the Feoffees ſhould be ſeiſed to the uſe of them, &c. in Fee, &c. And to Danby the ſaid Manor of Nayland, in tail, by reaſon of the Deviſe and Charter aforeſaid, as to the ſaid Manor of Nayland, and of other lands in Fee. And afterwards, 23 E. 8. notice was given to the Feoffees of the ſaid partition, and averred that the partition was equall, &c. and that the Feoffees were ſeiſed to the uſe of the ſaid partition, untill 27 H. 8. and confeſſed the Leaſe made by Danby to Calton, and all the aſſignments ſet forth in the Bar to the Avowry, and further ſhewed, That Thomas Danby entred upon Roſſe the Plaintiff, and enfoffed Rockwood, who enfeoffed Weſton.

Coke, for the Plaintiff, The Caſe is no more; but where a man hath iſſue, a ſon and a daughter by ſeverall women, and Deviſeth his Lands to his ſon, and the heirs of the body of the Father, lawfully begotten, in which caſe, if the

the Son dyeth without iſſue, the Tayl is extinct, and the Daughter ſhall never have the Land, for ſhe doth not take by way of Reverſion or Remainder, and ſhe doth not take in poſſeſſion, becauſe the poſſeſſion was in Jeofry who was the Heir of Henry, &c. And theſe Caſes were vouched; 1. Roberges Caſe, 2 E. 3. 1. to Tayl; John Mandevile took to Wife Roberge, and Mandevile gave Land to Roberge, & hæredibus ipſius Johannis quos ipſe de corpore prædict. Robergiæ procreaverit; there the Book is, That the Formedon was, Quæ P. dedit Robergiæ & hæredibus ipſius Johannis quos ipſæ de corpore dictæ Robergiæ procreaverit; Et quæ poſt mortem præfat. Robergiæ, & R. filii & hæredis dict. Johannis Mandevile, & hæredis ipſius Johannis de corpore dicto Roberg æ per dict. Johannem procreat. &c. and the ſame Writ awarded good, which Coke denyed to be Law. And he cited the Caſe of Dyer, 4 and 5 P. and Ma. 156. A. gives Lands to one for life, the Remainder thereof rectis hæredibus maſculis de corpore dict. A. legitime procreat. remanere inde rectis hæredibus dict. A. who hath iſſue two Sons, and dyeth; A. dyeth, the eldeſt Son hath iſſue a Daughter, and dyeth without iſſue male: And he conceived firſt, That in this caſe the limitation of the Remainder in Tayl to the right Heirs of the body of the Donee is voyd, for the Donee cannot make his own right Heir a Purchaſor, without departing with the Fee-ſimple of his perſon: But admitting the limitation is good, he ſaid we are to conſider, If this entayl to the Son, once veſted and commenced in the poſſeſſion of the Son, when he dyeth without iſſue male, the Eſtate be ſpent, or that the ſame ſhall go to the younger Son: And he ſaid, that it was the Opinion of Dyer in that caſe, That the younger Son was inheritable to the ſaid Eſtate-tayl: as in the Caſe of Littleton 82. where the condition is, That the Feoffee ſhall give the Lands to the Son and Heir of the Huſband and Wife, and to the Heirs of the body of the Father and Mother lawfully begotten: and the Huſband and Wife before any ſuch Gift dye, having iſſue, and afterwards the Feoffee gives the Land to the Son and Heir of the Huſband and Wife, and to the Heirs of the body of the Father and Mother begotten, the condition is well performed: and if the eldeſt Son, to whom the Gift is made, dyeth without iſſue, the youngeſt Son ſhall inherit: And in a Formedon in the Reverter, upon ſuch a Gift the Writ ſhall be, Et quæ poſt mortem of the eldeſt Son, ad ipſum reverti debet; becauſe the Huſband and Wife obierunt ſine hærede de corpor. ſuis inter eos exeunt. And ſuch was alſo the Opinion of Saunders. But Brook, Brown, and Catlin were clear contrary; And he ſaid, that Bendloes Serjeant, who reporteth that Caſe, doth affirm, That Judgment was given in that caſe, That the Eſtate-tayl was ſpent, and that the Daughter ſhould have the Lands, and not the ſecond Son: and ſo he ſaid, That in the Caſe at the Bar, the Eſtate-tayl was ſpent: But he ſaid, That he conceived that in the principal caſe at Bar there is not any Eſtate-tayl at all, becauſe the words (upon which the Eſtate-tayl is conceived) are incertain and too general, viz. [ſecundum antiquam Evidentiam,] for there might be many ancient Evidences, for the words may extend to Evidences which cut off the Eſtate tayl, as well as to the Entayl of Gontwardy. He alſo argued, That the Partition was voyd, and then the Leſſee had a good intereſt for certain parts of the Lands, for Partition cannot be made of an Uſe: And he ſaid, that he agreed, That Partition betwixt Huſband and Wifes of Lands, if it be equal, ſhould binde the makers, becauſe they are compellable to make Partition of them; but contrary of an Uſe, for that they are not compellable to do: Alſo, in the principal Caſe, the Land entayled is allotted to one of the Coparceners, which is not good but during the Coverture, and afterwards voyd; and then the Leaſe is voyd but in part, and ſo the Conuſance is not good.

Atkinſon contrary; and he ſaid, I conceive, That by words of Relation a Fee may paſs without the word Heirs. See 39 Aſſ. 12. The Father ſeiſed of Lands in fee, doth enfeoff his younger Son in fee, and the Father continues the poſſeſſion of the Lands, claiming to hold them at the will of the Son; and the Son coming into the Town where the Lands do lie, in the hearing of his Neighbours ſaith to his Father, You have given to me theſe Lands, naming them; As fully as you have given them to me, I give them back to you again: and the ſame was holden to be a good Gift to the Father: 43 E. 3. 22. The King ſeiſed of a Mannor, to which an Advowſon is appendant by Eſcheat or Conveyance, gives the ſaid Mannor as entirely as ſuch a one held the ſaid Mannor before the Eſcheat or Conveyance, the Advowſon ſhall paſs without ſpecial mentioning of it: And ſo here in our Caſe at Bar; This Will hath reference to the ancient Evidence, and it ſhall be as ſtrong as if he had ſet down the ſpecial words of Entayl; and to ancient Evidence before the Entayl it cannot extend, for then a fee ſhould paſs, and then the Deviſe ſhould be voyd, becauſe to his Heir; and the word Antiqua Evidentia ſhall have reference to the Charter which was made by Guntwardy, for that was an ancient Evidence made two hundred years paſt: And he cited the Caſe of 40 E. 3. 8. the Provoſt of Beverleys Caſe, and conceived that the Eſtate-tayl was in Jeofry, as the fee was in him. Lands are given to the Father for life, the Remainder to the Son in Tayl, the Remainder to the right Heirs of the Father; the Father dyeth, the Tayl and the Fee are in the Son; but yet after the death of the Son without iſſue, the Lands ſhall be in the Brothers Son by deſcent, and not as Purchaſor. And in our Caſe, Jeofry was in in the Tayl, as right Heir of Henry; and if Jeofry dyeth without iſſue, his Brother of the half blood ſhall have the Lands, as in the Caſe before cited of 40 E. 3. but that ſhall be in Tayl by force of the Deviſe. And he ſaid, That in this caſe here, the Partition was good enough, although it were of Lands in uſe, for a man might contract for an Uſe without Deed: 11 H. 4. Partition 156. Partition of an Advowſon without Deed: and that is by reaſon of the privity betwixt them, and becauſe they are compellable to make Partition: And in our Caſe they are compellable by Subpœna in Chancery to make Partition; and notwithſtanding that the Lands entayled be allotted to one Coparcenor onely, and the Fee to the other three, yet thereby the Partition is not voyd, but voydable: As an Exchange by Tenant in tayl is not voyd, but if the Iſſue in tayl accept of it, it ſhall binde him during his life: So here; and alſo by the death of the Husbands the Partition is not voyd, but voydable onely.

Clench, Juſtice; How ſhall the Heir be ſaid ſeiſed of the Lands entailed, which was allotted to his Father & Mother after acceptance and agreement?

Atkinſon, Of certain part as Iſſue in tayl, and of other parts by force of the Partition and acceptance. Quære of that: For if it be not of the whole as Iſſue in tayl, then the Leaſe is not voyd, but for ſo much whereof he was ſeiſed in tayl, and then the Leſſee is Tenant in common with Weſton, and then the Conuſance is not good.

Cooper, Serjeant elect; Here wants certainty, for the words of reference are too general, and therefore voyd, ad uſum rectorum hæredum, without ſhewing of the Donor or of the Donee; and they are not helped by the ſubſequent words, ſecundum antiquam Evidentiam ante hac factam, for that alſo is incertain; for it appeareth upon the Record. That there are divers Evidences of the ſaid Lands, as the Charter of Gift, the Recovery, and the Conveyances made 4 H. 7. and which of them is intended by the Deviſe, non conſtat: and the ſaid defect is not helped by any of the Averments; i. That the Deviſor was poſſeſſed of the ſaid Charter of Entayl at the time of his death; and it is alſo not to the purpoſe, for it

may

may alſo be, that he was poſſeſſed of other Evidences as ancient as the ſaid Charter of Entayl: It is ſaid, That there is no other antient Evidence of the Lord Scroop, but it is not averred, That there was not other ancient Evidences of the ſaid Lands. But admit that the limitation be good by that reference, yet there was not any Eſtate-tayl, for every Eſtate-tayl ought to be limited in certainty, which ſee in the Statute of Weſt. 2. ſecundum formam in Charta Doni manifeſto expreſſam, &c. and here it doth not appear upon the words of the Charter, if the Eſtate-tayl be limited to the Heirs of the Donor, or unto the Heirs of the Donee? and he ſaid, Admit that the ſame is an Eſtate-tayl, then the Queſtion is, If Jeofry be a Purchaſor? and if he be, then by his death without iſſue the Eſtate-tayl is ſpent: And he ſaid, That the Eſtate for life in Jeofry is drowned by the Eſtate-tayl limited to him, for they are united together.

Egerton, Solliciter-General; Reaſonable and favorable conſtruction ought to be made of this Deviſe according to the intent of the Deviſor: As 35 Aſſ. 14. Lands are given to B. and his Heirs, if he hath iſſue of his body; and if he dye without iſſue of his body, that the Land ſhall revert to the Donor and his Heirs, the ſame is a good Entayl; and upon the death of the Donee without iſſue, the Donor ſhall re-enter: And ſo here, although that [rectorum hæredum] be incertain words, yet the ſame is ſupplyed by the ſubſequent words, viz. ſecundum antiquam Evidentiam. As, where the King grants to a Major and Commonalty ſuch Liberties as London hath, the ſame is a good Grant: 2 H. 7. 13. And he conceived, That this Eſtate-tayl ſhall be ſaid to begin in Henry, although he was dead before, and that all his Iſſues ſhould inherit it, and that it ſhould not be determined by the death of Jeofry without iſſue; and in proof thereof he vouched the Caſe before cited, Littl. 81, 82. for in that caſe the condition could not be holden to be performed, if the Heir to whom the Gift was made in facto ſhould be in by purchaſe, and ſo the Eſtate-tayl ſpent by his death without iſſue: and alſo he vouched the Caſe of one Shelley, That although the Heir took that which was not ever in his Anceſtors, yet he did not take it as a Purchaſor, but as in courſe of a deſcent; and he alſo cited Robridges Caſe. And afterwards, the ſame Term, by award of the Court, Judgment was entered for the Plaintiff, for the incertainty of theſe words [ſecundum antiquam Evidentiam] to what Evidence it ſhould refer; and alſo [rectorum hæredum] without ſhewing whoſe Heirs, i. of the Donor, or of the Donee. And Wray, chief Juſtice, ſaid, It ſhall be intended upon this Will, That the meaning of the Teſtator was, That the Lands ſhould go unto his Heirs according to the Law, according to all his Evidences which he had of his Lands, and that is a Fee ſimple; and it ſhall not be intended, That the Teſtator had ſuch a ſpecial remembrance of one Deed made two hundred years before, viz. 25 E. 3.

Mich. 30 *Eliz.* In the Kings Bench. *Rot.* 482.

XXX. Perry *and* Somes *Caſe.*

SOme, Parſon of the Church of Sherring in Eſſex Libelled in the Spiritual Court againſt Perry, for the tithes of green Tares, eaten before they were ripe, and for the tithes of the Herbage of dry cattell, and for tithes of Sheep bought and ſold, and for Churchings and Burials; Perry prayed a Prohibition, and in his ſurmiſe; as to the green Tares, he ſaid, That they had uſed, time out of minde, &c. in the ſame Parish, In conſideration that they had not ſufficient meadow and paſture for their milch Kine, and draught cattell to pay for the tithes of the ripe Tares, the tenth ſhock, but for their green Tares which are eaten up before they are ripe, in conſideration that they

they gave them to their cattell, they had uſed to be diſcharged of any tithes thereof; and the truth was, That 400 acres of lands within the ſaid Town had uſed to be plowed and ſowed every year by the labour of draught cattell, and induſtry of the Inhabitants, and conſideration of which, and that in the ſaid Pariſh there was not ſufficient meadow nor paſture for their draught cattel, they had uſed to be diſcharged of the tithes of green Wares eaten before they were ripe: It was holden by the Court, that the ſame was a good cuſtom, and conſideration, for the Parſon hath benefit thereby, for otherwiſe the ſaid 400 acres could not be plowed; for without ſuch chiſt to eat with their draught cattell the green Wares, they could not maintain their plough cattell, and ſo the Parſon ſhould loſe his tithes thereof; and for the tithes of the green Wares, he hath the tithes of 400 acres. There was a Caſe lately, betwixt the Lord Howard and Nichols, where the ſuit in the Spiritual Court was for the tithes of Rakings and a ſurmiſe to have a Prohibition was made. That the Inhabitants had uſed to till and ſowe their lands, &c. and they had uſed to be diſcharged of their tithes of rakings after that the ſhocks were carried away. And Coke, who was of Councel with the Parſon, durſt not demurre upon it, but traverſed the Preſcription. Wray, chief Juſtice, The want of meadow and paſture in the Pariſh, is the great matter here, and there is not any miſchief here, as if they had ſurmiſed, that for want of meadow and paſture, they had eaten their meadows with their cattell; And it was held by the whole Court, that it was a good Preſcription.

Trin. 30 *Eliz.* In the Kings Bench.

XXXI. The Queen *and* Partridges *Caſe.*

IN a Quo Warranto, brought againſt Partridge, It was holden by all the Juſtices; That a man might preſcribe to hold a Leet oftener then twice in a year, and at other days then are ſet forth in the Statute of Magna Charta, Cap. 35. becauſe the ſaid Statute is in the affirmative: But Popham, Attorney Generall ſaid, That one cannot preſcribe againſt a Statute. And it was moved by him; If a generall Pardon be granted with generall Exception in it, he which will have advantage of it, ought to plead it, and ſhew that he is not any perſon excepted, for otherwiſe the Judges cannot allow him the benefit of it, becauſe they do not know if he be a perſon excepted or not; But if there be ſpeciall perſons excepted by name, and no others excepted, but ſo many perſons, there he need not to plead it; for the Court may diſcern J. D. from J. S. 8 E. 4. 7. vide 26 H. 8. 7. If a man commits Felony, and alſo Treaſon, and afterwards comes a generall pardon for Felony, but Treaſon is excepted, and the party is arraigned for Felony: By Coke he ſhall have the benefit of the pardon; Popham, contrary, For he is diſabled by the Treaſon: See Cokes Caſe, 13 Eliz. Plowd. 401. he pleaded to the Felony, the generall pardon by Act of Parliament, and added, that neither himſelf, nor the ſaid offence was excepted: And it was agreed by the whole Court, That in a Quo Warranto, it is not ſufficient for the Defendant to ſay, That ſuch a Subject hath lawfull intereſt to hold Leets without making title to himſelf; for the Writ is, Quo Warranto, he claims them. And afterwards Judgement was given for the Queen.

Trin.

Trin. 30 *Eliz.* In the Kings Beneh.

XXXII. Woodward *and* Buggs *Caſe*.

WOodward Libelled in the Spiritnall Court againſt Bugg and Nelſon for Tithes of certain Lands, called Chriſtian-Hill; The Defendant ſued a Prohibition, and ſurmiſed, That one Prettiman was ſeiſed of the ſaid Land, and in conſideration of 5 l. by him paid to the ſaid Parſon, it was agreed betwixt them, That the ſaid Prettiman and his aſſignes ſhould be diſcharged of the tithes of the ſaid lands, during his life. And afterwards the ſaid Pretiman Leaſed the ſame to the Defendants, upon which a Prohibition was granted; and it was holden that the party need not to make proof thereof within ſix months, for it is not within the Statute, becauſe a compoſition with the Parſon: But now a conſultation was granted in the ſame Cauſe, becauſe the agreement is ſhewed, but no need of it, the which cannot be any diſcharge; but if it had been for a time, i. Unica vice, it had been good, but contrary, being for life: Alſo there is not an expreſſe Grant of tithes, but onely a Covenant, and agreement that he ſhould be diſcharged, upon which he may have an Action, but no Prohibition: It was ſaid on the other ſide, That although without Deed tithes cannot paſſe in point of intereſt; yet by way of diſcharge they well may. Coke, It was holden betwixt Pendlton and Green, That upon ſuch words, of Covenant and agreement, the party ſhould hold the lands diſcharged of tithes, which was denied: For if the Grantee of a Rent-charge will grant it to the lands without Deed, it is not good; And there was of late, a Caſe betwixt Weſtbed and Pepper, where it was agreed betwixt the Parſon and one of his Pariſh, that for twenty ſhillings Rent per ann. the Pariſhioner ſhould be diſcharged of tithes for twenty years, if he lived ſo long; and it was holden that no Prohibition did lie thereupon, a Fortiori where the Eſtate is for life: Gawdy, In a Caſe of Grant of tithes for life, a Deed is requiſite, but here it is but a Covenant for money: See 21 H. 6. 43. Wray, If it had been for years, it had been good, but here it is not any Contract, but onely a diſcharge for life, which cannot be during his life, without Deed; And afterwards the Record was read, which was Concordatum & agreatum fuit between the two parties, pro omnibus decimis, during the time that the one ſhould be Parſon, and the other, occupier of the ſaid lands, that in conſideration of 5 l. The ſaid Prettiman and his aſſignes, ſhould hold the ſaid lands diſcharged of tithes: Wray, The ſame is not a Contract, but Premiſe; for he doth not grant any tithes, &c.

Paſc. 32 *Eliz.* In the Kings Bench.

XXXIII. Devered *and* Ratcliffs *Caſe*.

IN Debt, the Plaintiff declared, That he himſelf had brought an Action in London againſt one A. and had Judgement to remove; and a Capias was awarded and iſſued forth, to take the ſaid A. in execution upon which, Non eſt inventus was returned; upon which, one of the ſureties of A. being in priſon in London, under the cuſtody of the Defendant, upon a Plaint againſt him, was detained in priſon for the ſaid Debt ſo recovered againſt A. Secundum conſuetudinem Civitatis prædict. prout per record. ejuſdem Curiæ apparet, and after the Defendant ſuffered the ſurety to eſcape; upon which there was a demurre; The matter was, If the ſaid ſurety was a priſoner in Law for the ſaid Debt, as ſurety of A. for in

the Declaration it is not expreſly laid, that there was ſuch a cuſtom in London, ut ſupra, but onely, Secundum conſuetudinem, &c. And ſecondly, there were two ſureties of A. and the one of them onely is detained in execution: Alſo the cuſtom, as it is here laid, is not reaſonable; For a Scire facias ought to iſſue out againſt the ſureties, and they ought not to be taken or detained in execution preſently; For the condition of the Recognizance of ſureties is, That they bring in the Defendant, if he be condemned, or to pay the Debt; and now by this cuſtome, the party who is ſurety, being taken cannot plead the releaſe of the Plaintiff, or the death of the Defendant in his diſcharge, as he might upon a Scire facias, which was agreed per Curiam; and adjudged accordingly.

Trin. 30 *Eliz.* In the Kings Bench.

XXXIV. Clark *and* Greens *Caſe.*

AN Action upon the Caſe was brought for theſe words: He liveth by Charming, Sorcerie, and Witchcraft; It was moved, that the words were not actionable; for the words might be conſtrued, as if the life of the party were preſerved by ſuch means. And it was holden, 30 Eliz. in the Caſe betwixt Smith and Morrice, that the word Witch is not actionable; And therefore, If a man be ſued in the Spirituall Court for defamation, for calling one Witch, a Prohibition doth not lie. It hath been holden, that upon theſe words, He went to deſtroy a childe in a womans belly, were actionable, and yet it is not Felony, but a great diſcredit; and theſe words, Thou uſeſt Witchcraft, are not actionable. And afterwards, in the principall Caſe, Judgement was given, Quod nihil capiat per Billam. And by Gawdy, It might be that the Plaintiff had the forfeiture of thoſe who are convicted of offences, and ſo liveth thereby.

Trin. 30 *Eliz.* In the Kings Bench.

XXXV. Harford *and* Gardiners *Caſe.*

IN an Action upon the Caſe, The Plaintiff declared, That the Defendant in conſideration that the Father of the Plaintiff had imployed his ſervice about the buſineſſe of the Teſtator of the Defendant, to the great profit of the Teſtator; and in conſideration of love and affection that the Teſtator bore to the Plaintiff, promiſed to give unto him 100 l. Curia. Love is not a conſideration, upon which an Action can be grounded; the like of friendſhip: Wray, If the Plaintiff declares, That the Defendant in conſideration that he was indebted unto the Plaintiff in divers ſummes of money, and promiſed to pay him 1000 l. it is not good for the incertainty: Alſo the Conſideration here, was paſt and executed before the promiſe made, and nothing is done by the ſon. And afterwards Judgement was given againſt the Plaintiff.

Mich. 31 *Eliz.* In the Exchequer.

XXXVI. Clarks *Caſe.*

BRidget Clark was indebted to Archdell by Obligation, and afterwards ſhe delivered to one Andrews certain Hogſheads of Wine to ſatisfie

the

the ſaid Archdel de debito prædicto: afterwards the Obligation of Clark was aſſigned to the Queen for the Debt of Archdel: And if the property of the ſaid Hogſheads of Wine were altered by the delivery of them to Andrews before the aſſignment? was the queſtion.

Egerton, Sollicitor General; The property is not altered; for the Bayler might have an Action of Account againſt Andrews before he hath delivered them over according to the Baylment; but if he hath delivered them over, the ſame is a good bar in Account: But if one be accountable to me upon a Baylment, and afterwards I require him to bayl the goods over to A. the ſame is not in bar of the Account, but is a good Plea in diſcharge of Account before Auditors, for that is matter after the Baylment, not upon the Baylment. If Goods be bayled to bayl over upon a conſideration precedent on the part of him to whom they ought to be bayled, the Bayler cannot countermand it, otherwiſe it is where it is voluntary and without conſideration, but where it is in conſideration of a Debt not countermandable; contrary, if to ſatisfie the Debt of another.

Manwood, chief Baron: Where the Debtor of the King is ſufficient, there a Debt due to him ought not to be aſſigned to the King, but onely where the Debt is doubtful, and that was the ancient courſe: but now at this day many ſeem and are accounted to be rich who are not, and therefore omnis ratio tentanda eſt to recover the Debts of the King. But as to the Caſe before us, Bridget is Executrix to her Husband, who was indebted to Archdel, and ſhe delivered the Goods to Andrews to ſatisfie Archdel, and all that before the Aſſignment. And I conceive that the property of the ſaid Goods is altered: for, as the caſe is here, Andrews was Surety for Clark, and had a Counter-Bond of Clark to ſave him harmleſs. If I borrow Money, and deliver Plate for the ſecurity of it, the general property is in me, yet the Baylee hath a ſpecial intereſt in it, till the Money is payd. If Goods be delivered to A. to pay to B. A. may ſell them. An Executor hath Goods of the Teſtator, and he with his own Monies pays the Debts of the Teſtator, he ſhall retain the Goods, and the property is altered. And here in our Caſe, Andrews might by vertue of the Baylment ſell the Goods, and with the Money pay the ſaid Archdel. And afterwards Judgment was given, That the property of the Goods was altered.

31 *Eliz.* In the Exchequer.

XXXVII. Norris *Caſe.*

IN an Information upon Intruſion againſt Norris and others concerning Folly John Park, the Defendants pleaded in Bar a Deſcent: It was holden clearly by the Court, That againſt the Queen a Diſcent is no Plea, nor any Title againſt the Queen, becauſe nullum tempus occurrit Regi: neither ſhall Laches be imputed to her: for the poſſeſſions of the Queen are large, and it is not reaſon that ſhe ſhould be bound or tyed to look to her affairs concerning her poſſeſſions, or to incur any damage in default thereof; for ſhe is to intend and manage the publique affairs of the Kingdom and State. It was alſo held by the Court, That in pleading of a Leaſe for life, or Feoffment, the party needs not to ſhew the place where the Leaſe or Feoffment was made.

Popham, the Queens Attorny, took Exception to the Bar to the Information, That whereas in the Information Title is made to the Queen, and concludes, prout patet per plurima Records & memoranda Scaccarii; the Defendants have not Traverſed it by ſaying, Abſque hoc quod habetur aliquod tale Recordum: To which it was ſaid by Harris and Savil, Ser-

jeants,

jeants, That if a ſpecial Record had been alledged in certainty, then we ought to have taken ſuch Traverſe; but here it being in the generalty, we ought not to traverſe at all. Manwood, Becauſe the Information is general, i. ut patet per plurima Recorda, ſo the Traverſe ought to be alſo.

Another Exception was taken to the Bar, becauſe in the Information the Title of the Queen is ſet forth: and the Defendants plead, That long before the Intruſion A. was ſeiſed in Fee, and enfeoffed B. who dyed ſeiſed, &c. where it might be that the Title of A. was mean betwixt the Title of the Queen and the Intruſion: whereas by Manwood and Popham they ought to have ſaid, Diu antequam the Queen was ſeiſed, A. was ſeiſed, &c. Savil and Harris, If which ſhould ſo plead, we ſhould confeſs that the Queen once had a Title, and that is not true, which Manwood denyed, for by ſuch Plea nothing is confeſſed. And it was ſaid by ſome, That where in the Bar the Title of the Queen is confeſſed and avoyded, there the Defendant ſhall ſay, Diu antequam the Queen had any thing, &c. otherwiſe not. And it was holden by all, That in ſuch caſe, a Feoffment might be an inducion unto a Traverſe, but not a Deſcent. And by Manwood, it is a general Rule, as well in the caſe of a Subject, as in the caſe of the Queen, That nothing can be an Inducement to a Traverſe, but ſuch a thing as is Traverſable; and here the Deſcent induceth the Traverſe, being not Traverſable in this caſe. Alſo it was holden, That the place where the party dyeth ſeiſed needs not to be ſhewed in pleading a Deſcent. And afterwards Manwood at another day, mutata opinione, conceived, That as to plurima Recorda, there needed no Traverſe, although there were many preſidents to the contrary: Diu ante tranſgreſſionem fieri ſup. is a good Plea in Treſpaſs in Caſe of a common perſon, not in the Kings Caſe, diu ante Intruſionem, &c.

31 *Eliz.* In the Exchequer Chamber.

XXXVIII. Robinſon *and* Robinſons *Caſe.*

IN the Caſe betwixt Robinſon and Robinſon in the Exchequer-Chamber by Engliſh Bill concerning the Manor of Draiton Baſſet; The Defendant pleaded in Bar a ſpecial Plea, to which the Plaintiff replyed; and afterwards the Defendant, when he ſhould have Rejoyned, would have relinquiſhed his ſpecial Plea, and pleaded the general Iſſue.

Manwood, In the Common Pleas, and Kings Bench, and in the Court of Common Pleas in the Exchequer, before the Iſſue joyned, the Defendant might relinquiſh his ſpecial Plea, and plead the general Iſſue, for the Pleadings there are in paper until Iſſue be joyned, and therefore at any time before Iſſue joyned, the Plea might be withdrawn: But in the Chancery, Court of Requeſts, and here, all Pleas put in are in Parchment, and filed; and therefore it cannot be ſo done: and therefore here, if the Plea be once ingroſſed into Parchment and filed, the Defendant cannot relinquiſh his Plea, and plead the general Iſſue; contrary, where the Plea is yet in Paper.

Gent, Baron, That if upon the Plea in Paper an Iſſue be offered with an Abſque hoc &c. the other party cannot relinquiſh it, although it be but in Paper. But afterwards the Barons asked the Clarks, what was their courſe in ſuch caſes? who anſwered, That if the Plea be in Parchment, and upon the File, it ſhall never afterwards be taken from off the File, but with the conſent of the parties, and Order of the Court. And afterwards

warns Manwood, with the aſſent of the reſt of the Barons, gave a Rule, That the Defendant ſhould rejoyn to the Replication, or otherwiſe a Nihil dicit to be entered.

31 *Eliz.* In the Exchequer.

XXXIX. *The Lord* Cromwels *Caſe.*

IN the Caſe of the Lord Cromwel upon the Statute of 33 H. 8. for levying of the Kings Debts: A Debt came to the Queen by Attainder of the Creditor, upon which an Extent iſſues againſt one of the Ter-tenants liable to the Debt, and not againſt all: It was moved, That upon a branch of the ſaid Statute, all the Ter-tenants ought to be charged: But it was the Opinion of divers, That ſuch a Debt which cometh to the King by Attainder, is not within the ſaid Statute; for although the Attainder is by a Judgment, yet Debt by Judgment it cannot properly be ſaid, but where a Debt is recovered by Judgment. And that was the Caſe of the Lord Norris, for a Debt due to Heron by the Lord Williams, which Heron was attainted. 7. Ly. 22

Hill. 29 *Eliz. Rot.* 631. In the Common-Pleas.

XL. Machel *and* Duntons *Caſe.*

IN Ejectione Firmæ the Caſe was, That one Machel, Alderman of London, was ſeiſed and Leaſed for years, with clauſe of re-entry for non-payment of Rent; and in the Indenture of Leaſe there were divers Covenants on the part of the Leſſee: And afterwards the ſaid Machel by his Will willed, That the Leſſee ſhould retain the Land demiſed for thirty one years, reckoning the years of the firſt term not expired as parcel of the ſaid term of thirty one years, yielding like Rent, and under ſuch Covenants as the Leſſee held the former Leaſe: and by the ſame Will deviſed the Inheritance over to a ſtranger. It was firſt moved, If here the Leſſee for years had a new intereſt accrued to him by the Will? If it ſhall veſt in him as an intereſt by it ſelf, or that both Eſtates, as well the former Leaſe, as the Eſtate for years deviſed by the Will, ſhould be united by way of Surrender? Another matter was, becauſe that the Deviſe is yielding ſuch Rent, and under ſuch Covenants, &c. Now becauſe the meaning of the Deviſor was, That the Deviſee ſhould hold over the Land for the term encreaſed as he held before; If here the Law ſhall give conſtruction to this Deviſe as neer the intention of the Deviſor as it may be? and ſo conſtrue the words of the Will to amount to a condition. But by the Opinion of the whole Court, The words of the Deviſe cannot make a Condition; for a Condition is a thing odious in Law, which ſhall not be created without ſufficient words. Another matter was moved, If the Fee-ſimple ſhould paſs by this Deviſe in point of Reverſion, or Remainder? And by the better Opinion of the Court, it ſhall paſs in point of Reverſion; for if it ſhould be a Remainder, then the Rent which is reſerved upon the Leaſe by the Will, ſhall not be incident to ſuch Remainder, and therefore the Law ſhall qualifie it into a Fee-ſimple. Another matter was moved; Admitting that the words of the Deviſe, ut ſupra, are Condition, If here in this Caſe there be a Grantee of the Reverſion intended within the Statute of 32 H. 8. As A. ſeiſed of Lands in Fee, deviſeth them to B. for years, rendering Rent, with clauſe of Re-entry; and by the ſame Will

deviſeth the Reverſion to another: If becauſe that it was never in the Deviſor a Reverſion or a Condition? If the Deviſee be within the ſaid Statute to take advantage of it? And the Opinion of the whole Court was, That the Deviſee of the Fee-ſimple ſhould take advantage of this Condition.

XLI. *Trin.* 29 *Eliz.* In the Common-Pleas.

A Juſticies iſſued forth to the Sheriff of H. for the Debt of 40 l. and the ſame Plea was held and determined before the Under-Sheriff in the abſence of the Sheriff: It was moved by Puckering, Serjeant, If a Writ of Error or a falſe Judgment lieth in this Caſe? And it was reſolved by the Juſtices, That the Sheriff himſelf in his perſon ought to hold Plea of a Juſticies; and if he make a Precept or Deputation to another, it is meerly voyd: 34 H. 6. 48. See the Caſe there abridged, Fitz. Bar 161. And a Juſticies is not an Original Writ, but a Commiſſion to the Sheriff to hold Plea above 40 l. And upon a Judgment given upon a Juſticies, a Writ of falſe Judgment lieth, and not a Writ of Error. See 7 E. 4. 23. And it was the Opinion of the Lord Anderſon, That the Judgment given in the principal Caſe was utterly voyd, & coram non Judice.

Trin. 29 *Eliz.* In the Exchequer.

XLII. *The* Queen *and* Jordans *Caſe.*

AN Information was exhibited in the Exchequer for the Queen againſt the Executors of William Jordan, Surveyor of the Ordnance, &c. and the Executors of John Bowland, Deputy of Ambroſe Earl of Warwick, Maſter of the Ordnance, &c. In which was ſet forth for the Queen, That certain Powder, Pellets, and other furniture of War, came unto the hands of the ſaid Jordan and Bowland, in reſpect of their ſaid Offices, to the value of 400000 l. and ſhewed how much came to each of them, and the ſpecial charge incertain, per quod onerabiles & computabiles Dominæ Reginæ devenerunt, nec tamen computum unquam inde reddiderunt, nec reddere voluerant, ſed bona & catella prædicta ad uſus ſuos proprios converterunt, in deceptionem dictæ Dominæ Reginæ, &c. The Defendants pleaded Not guilty, upon which the Queens Attorny did demur in Law, becauſe the Defendants have anſwered onely to the Converſion: in which caſe, although they have not converted, yet if the ſaid Goods have come to the hands of their Teſtator, it is ſufficient for the Queen, and the Defendants are chargeable to the Queen for the ſame: And the Opinion of all the Barons was clear, That the Defendants ought to anſwer to the Charge, &c.

Paſc. 29 *Eliz.* In the Common-Pleas.

XLIII. Collet *and the Bayliffs of* Shrewsburies *Caſe.*

IN a falſe Impriſonment, the Defendants juſtified by Preſcription, ſcil. That they have uſed, if any perſon within their Town contemptuoſe ſe geſſerit againſt the Bayliffs of the ſaid Town, or any Warden of any Trade

Trade there, to commit ſuch a perſon to Priſon for the ſpace of a day or more at the leaſt, at their diſcretions: And ſhewed further, That the Plaintiff did miſ-behave himſelf, tam dictis quam verbis, againſt the Wardens of ſuch a Myſtery in the ſaid Town, &c. And when the Bayliffs, ſuper Querimoniam eis inde factam, ſent for the Plaintiff, he would not come to them, but miſ-behaved himſelf againſt them, tam dictis quam factis; for which they did commit him to Priſon, &c. upon which there was a Demurrer. And afterwards Judgment was given for the Plaintiff, becauſe their Preſcription is not good, for it is too large to impriſon Subjects at their diſcretion: Alſo they have ſet forth the Offence of the Plaintiff generally; i. Miſ-behaviour, tam factis quam dictis, without alledging any ſpecial Miſdemeanour in certain.

XLIV. *Paſc.* 29 *Eliz.* In the Common Pleas.

IT was holden by the whole Court, That where a man makes his Will in this manner, I will and bequeath my Land to A. and the name of the Deviſor is not in the whole Will, yet the Deviſe is good, by averment of the name of the Deviſor, and by proof that it was his Will. And if one lying ſick in extremis, having an intent to deviſe his Lands, by word makes ſuch a Deviſe, but doth not command the ſame to be put in writing, but another without his knowledg or command puts the ſame in writing in the life of the Deviſor, it is a good Deviſe, for it is ſufficient if the Deviſe be reduced in writing during the life of the Deviſor.

Trin. 27 *Eliz.* In the Common Pleas.

XLV. Leonard Lovelaces *Caſe*.

IN Waſte, the Caſe was, That Lands were deviſed to the Father of the Defendant, and to his eldeſt Iſſue male, de corpore ſuo exeunti: And upon Demurrer it was adjudged, That by this Deviſe no Eſtate paſſed but an Eſtate for life unto the Father of the Defendant, the Remainder to his eldeſt Son for life, ſo as no Eſtate of Inheritance paſſed thereby; and therefore puniſhable for Waſte.

Hill. 33 *Eliz.* In the Common Pleas.

XLVI. Cobb *and* Priors *Caſe*.

THe Caſe was, A man deviſeth his Lands to his Wife during the minority of his Son, upon condition, That ſhe ſhall not do Waſte during the minority of her ſaid Son, and dyeth: The Wife takes a Huſband, and dyeth; the Huſband commits Waſte: It was holden by the whole Court, That the ſame is not any breach of the Condition. *S. C. pa.* 48.

Mich.

Mich. 30 *and* 31 *Eliz.* In the Common Pleas.

XLV. Salway *and* Lusons *Case.*

MAtthew Salway brought a Writ of Right against Luson, and the Writ was, Messuagium, & 200 acr. jampnor. & brueræ, and exception was taken to the Writ, because that jampnor. & brueræ, were coupled together where they ought to be distinctly severed; as so many acr. jampnor. and so many acr. brueræ, although it was objected on the part of the Demandant in maintenance of the Writ, That in the Register, fol. 2. the Writ of Right is, Redditu unius libræ Mac. & Obed. i. Mace and Cloves together without distinction or severance. And it was said in a Writ of Right, we ought to follow the Register, and therefore a Writ of Right was abated, because the word Pomarium was put in the Writ, for in the Register, there is no such Writ, and the word Gardinum comprehends it, But in other Writs, as Writs of Entry, &c. it is otherwise: See the Case of the Lord Zouch 11 Eliz. 353. In a Writ of Entry, Sur Disseisin mille acr. jampnor. & brueræ. But the exception was not allowed; for it maybe, that jampnorum & brueræ lie so promiscuously, that they cannot be divided: And see 16 H. 7. 8. and 9. The respect which the Justices there had to the Register, so as they changed their opinions, conformable to the Register: Another exception was taken to the Writ, because the Demandant demands duas partes custodiæ de Hay in the Forest of C. and the opinion of the whole Court was, that the Writ ought to be Officium custodiæ duarum partium de Hay, and not duas partes custodiæ, As Advocatio duarum partium Ecclesiæ, not duas partes advocationis: another exception was, because the Writ was, duas partes, &c. i.e three to be divided, whereas it should be divisus, & non dividend. for dividendum is not in any Writ but a Writ of Partition. And by Windham, The parts of this Office are divided in right, Quod Curia concessit: another exception was taken, because in the Writ, it is not set down in what Town the Forest of C. is, so as the Court doth not know from whence the Visne should come; for no Venire shall be de vicineto Forestæ, as de vicineto Hundredi, & Manerii; and that was holden to be a materiall exception: Another exception was taken, because a Writ of Right doth not lie of an Office; for at the common Law, an Office did not lie of it, but now it doth by the Statute of West. 2. For it was not liberum tenementum, but the party grieved was put to his Quod permittat. And of this opinion was the whole Court.

Hillar. 31 *Eliz.* In the Common Pleas.

XLVIII. Johnson *and* Bellamys *Case.*

IN Ejectione firmæ, It was found by speciall Verdict, That Mr. Graunt was seised of the Lands, &c. and by his Will Devised the same to Joan his wife, for life; and further he willed, That when Richard his brother shall come the age of 25 years, he should have the Lands to him and the heirs of his body lawfully begotten. Walter Graunt died, having issue of his body, who is his heir, Richard, before he had attained the age of 25 years, levied a Fine of the said Lands, with Proclamations in the life, and during the seisin of Joan, to A. Sic ut partes ad finem nihil habuerunt: and if this Fine should binde the Estate tail was the Question; And the Justices cited the Case of the Lord Zouch, which was adjudged, M. 29 and 30. Eliz. Tenant in tail discontinues to E. and afterwards levieth a Fine, to B. although the partes

ad

ad finem nihil habuerunt, yet the Fine ſhall binde the entail: But the Serjeants at Bar argued, That there is a great difference betwixt the Caſe cited, and the Caſe at Bar; for in that Caſe, the ſaid Fine was pleaded in Bar, but here the Fine is not pleaded, but found by ſpeciall Verdict; To which it was ſaid by the Court, that the ſame was not any difference; For the Fine by the Statute is not any matter of Eſtoppel, or concluſion; but by the Statute doth binde and extinguiſh the Eſtate tail, and the right of it; and Fines are as effectuall to binde the right of the entail when they are found by ſpeciall Verdict, as when they are pleaded in Bar: And by Periam, Collaterall Warranty found by Verdict, is of as great force, as if it were pleaded in Bar, And afterwards Judgement was given, That the Eſtate tail by the Fine, was utterly deſtroyed and extinct.

Trin. 29 *Eliz.* In the Common Pleas.

XLIX. Jayes *Caſe.*

JAy brought an Action of Debt before the Mayor of Shrewsbury, &c. and declared upon an Obligation which was upon Condition to pay money at London, and iſſue was there joyned upon the payment. And it was moved how this iſſue ſhould be tried, viz. If it may be removed by Certiorare into the Chancery, and thence by Mittimus into the Common Pleas, and from thence ſent into London to be tried, and when it is tried, to be remanded back to Shrewsbury to have Judgement: See 21 H. 7. 33. Upon voucher in the County Palatine of Lancaſter, the Law is ſuch in matters reall; for reall actions cannot be ſued but in the ſaid County Palatine, but in perſonall matters it is otherwiſe, for ſuch actions may be ſued elſewhere, at the pleaſure of the party; And thereunto agreed the whole Court: and although ſuch matters have been removed before, yet the ſame were without motion to the Court, or oppoſition of the other party, and ſo not to be accounted Preſidents: See 3 H. 4. 46. abridg'd by Brook, Cauſe de remover Plea 41. Where he ſaith, That a Forrein Plea pleaded in London in Debt, goes to the juriſdiction; but upon a Forrein Voucher in a Plea reall, the Plea ſhall be removed in Banck by the Statute to try the Warranty, and afterward ſhall be remanded.

Trin. 29 *Eliz.* In the Common Pleas.

L. Sands *and* Scagnards *Caſe.*

IN an Action upon the Caſe, The Plaintiff declared, that he was poſſeſſed of certain Chattells which came to the Defendant by Trover. The Defendant pleaded, That heretofore the Plaintiff brought Debt againſt the now Defendant, and demanded certain moneys, and declared, that the Defendant bought of him the ſame goods, (whereof the Action is now brought) for the ſumme then in demand, to which the then Defendant waged his Law and had his Law; by which Nihil Capiat per breve, &c. was entred. And demanded Judgement, if, &c. And by Windham and Rodes, Juſtices, The ſame is no bar in this Action, for the waging of the Law, and the doing of it, utterly diſproves the Contract ſuppoſed by the Declaration in the ſaid action of Debt, and then the Plaintiff is not bound by the ſuppoſall of it, but is at large to bring this Action; and ſo Judgement was given for the Plaintiff.

Trin. 29 *Eliz.* In the Common Pleas.

LI. Spittle *and* Davies *Case.*

IN a Replevin, the Case was, That one Turk was seised of certain Lands in Fee, and by his Will devised parcell of his said Lands, to his eldest Son in tail, and the residue of his Lands to his younger Son in Fee, Provided, that neither of my said Sons, shall sell or make Leases of the Lands given or bequeathed unto them by this my Will, or do any Act with any of the said Lands, to the hindrance of their children or mine, by any devise or means, before they come to the age of 30 years; and if any of my Sons do so, then my other Son shall have the portion of my Lands so devised to his brother, the eldest Son before his age of 30 years Leased the Lands to him devised, ut supra, for years, against the intent of the said Proviso. The younger Son entred, and he Leased the same Land for years before his age of 30 years, Upon which the eldest Son did re-enter, and the opinion of the Court was, that here is a Limitation, and not a Condition; and here the re-entry of the eldest Son was holden unlawfull; for this Proviso did not extend but to the immediate Estate devised, expressly to them, and not to any new Estate, which did arise upon the limitation; and when the younger Son enters upon the eldest Son by the said Limitation, he shall hold his Estate, discharged of the Proviso, or any limitation contained in it.

Trin. 30. *Eliz.* In the Exchequer.

LII. Martin Van Henbecks *Case.*

AN Information was exhibited in the Exchequer, against Martin Van Henbeck, Merchant Stranger, upon the Statute of 18 H. 6. Cap. 17. concerning the gaging of vessells of Wine, and shewed, That the Defendant had sold to such a one, so many pipes of Wine, and that none of them did contain as they ought, 126 gallons; and although they were so defective, yet the Defendant had not defalked the price, &c. according to the want of measure, for which he had forfeited to the Queen, all the value of all the Wine so defective. Exception was taken to the Information, because there is not set down how much in every Pipe was wanting, as one, or two gallons, &c. so as a ratable defalcation might be made according to the proportion of the want of measure; But if the Informer had set forth in his Information, that no defalcation was at all, such generall allegation of want of measure, without other certainty, had been good. And the Case was cited, 22 E. 4. 40. Lysles Case, Where the plea wants certainty; or where he pleads that he was ready to shew to the Councell of the Plaintiff his discharge of an Annuity, &c. and doth not shew what manner of discharge, as release, &c. So 2 H. 7. 6. in Dower, against the heir, who pleads in Bar, Detainment of Charters, without shewing what Charters in certain: alls there is time enough of defalcation, when the time of paiment comes, and not upon the Contract; and it is not shewed, that the Vendee had payed for the Wine. Egerton Solicitor, contrary, When the thing demanded is to be recovered, there it ought to be certainly shewed, but contrary, where it doth only to the point of Conveyance of the Office; and here, the thing to be abated is not in question; for be it more or lesse, the Defendant is to lose the value of all the Wine, and that which is to be defalked, is but an Induction, or

Conveyance

Conveyance tending to the payment of the forfeiture: As in Partridges Caſe, 7 E. 6. Plow. 85. Whereupon the Statute of 32 H. 8. of Maintenance, The Plaintiff charges the Defendant with a Leaſe for years, made to a ſtranger, without ſhewing for what term certain, and yet it was there holden well enough, notwithſtanding that the Leaſe was not to be forfeited, but was a Conveyance to the point of forfeiture; i. the value of the Lands 38 Aſſ. 12. A Steward of a Leet was preſented, for that he had ſuffered many Brewers and Bakers to bake and brew, contrary to the Aſſiſe, pro redemptione inde capiend. without ſhewing in certain, what Bakers, or of whom he had taken redemption; but notwithſtanding that, the Defendant took iſſue upon the matter, &c. And it is impoſſible for the Informer, to know the quantity of the full meaſure of every pipe of Wine, which doth not belong to him, but to another, and if the Law ſhould compell him to this impoſſibility, the Statute ſhould be of none effect. 3 E. 3. 363. In Nuſance for drowning of his lands, exception was taken, becauſe it was not ſet forth what quantity of land, but it was not allowed; for it is impoſſible to know, to what depth the land was drowned, and how much of the land was drowned: So here, the Informer cannot know every ſpoonfull, &c. And he ſaid, that the defalcation ought to be at the time of the Contract, or within convenient time after. Coke, contrary, Here is a great incertainty, which is not tollerable in an Information, for the quantity of the want is uncertain, and ſo likewiſe the quantity of the defalcation, for the want muſt be fourty, twenty, ten, five, or one gallon, pottle, quart, or pinte, and in ſuch Information upon penall Laws, the matter of it ought to be certainly ſhewed, Oportet ut res certa deducatur in judicium, ſo as the Court may judge thereof: as where an Information is exhibited upon the Statute of Uſury, That Statute is, that if any take above 10 l. for the loan of 100 l. for one year, he ſhall forfeit the whole value of the principall, here there ought to be an uſurious Contract for above 10 l. in the hundred; and alſo there ought to be a taking; and it is impoſſible to diſcover the ſubtilty of an Uſurer: But if Information be exhibited here againſt an Uſurer, and chargeth that he took more then 10 l. in the hundred, without ſhewing how much, ſuch Information is utterly inſufficient; for the Informer ought to ſet forth the quantity of the intereſt received, and yet the ſame is not to be recovered: Alſo if the Informer ſetteth forth an uſurious Contract, Cum quodam homine ignoto, it is inſufficient, 5 H. 7. 17, 18. If an Information be exhibited upon the Statute of Liveries, as well the giver as the taker, ought to be certainly ſhewed, &c. Another exception was taken, becauſe the words of the Information are, Quæ quidem dolia, vel eorum aliquod, &c. did lack, &c. But by Manwood, the ſame is well enough. Wherefore Coke did not ſpeak to it; And he ſaid, that the time of the defalcation of the price is upon the paiment, and not before. If J. S. lend to one 100 l. for a year, and upon the loan, contract with me, to give me 10 l. for the loan of the ſame for one year, If now when I pay him, he taketh but 10 l. he ſhall not be puniſhed for the Contract, but perhaps the Bond ſhall be void. And upon the Statute of 5 E. 6. of Ingroſſors, If the Information be, that the Defendant hath bought Corn, &c. it is not ſufficient; for the words of the Statute are, Get into his hands, &c. Owen Serjeant, to the ſame purpoſe: He hath not alledged, Quantum, vel in quanto defecit, If there had been but a Pint, it had been ſufficient; The Information goes farther, Non defalcavit tantum de precio, quantum defecit, and ſo tantum, & quantum, is incertainty ſaid; 22 H. 6. If A. be bound to B. to make him a ſufficient Eſtate in ſuch Lands, in an Action brought upon ſuch an Obligation, it is no plea to ſay, That he hath made unto him a ſufficient Eſtate, &c. but he ought to ſhew what Eſtate: So 7 E. 4. If one be bound to repair ſuch a houſe, It is not ſufficient to ſay, that he hath repaired it, but he ought to ſhew, in hoc, vel in illo: Egerton, The abate-

ment

ment ſhall be upon the Contract. And afterwards Judgment was given againſt the Informer, becauſe it is not ſhewed in the Information in how many Veſſels there was want; but if he had alledged but the want of one Pinte, it had been good for the value of all the Wine: and by Manwood that might have been well enough known by the Gauging how much every Veſſel wanted.

Mich. 30 *Eliz.* In the Exchequer.

LIII. Green *and* Everards *Caſe.*

IN Ejectione Firmæ againſt Everard by Green, the parties were at iſſue, and the ſaid Green challenged one of the Jurors, and aſſigned for cauſe, becauſe the ſaid Juror held Land under the ſame Title as the Defendant did: To prove which one Lancelot Chandler was produced as a Witneſs for the ſaid Green, who depoſed upon the ſaid Challenge the ſame, for which the Juror challenged was drawn, and ſo there was no Inqueſt; and ſo the Plaintiff was delayed of his Tryal: whereupon he ſued the ſaid Lancelot, tam pro Domina Regina quam pro ſeipſo: and it was found for the Plaintiff. And now Exception in Arreſt of Judgment was put into the Court engroſſed in Parchment; viz. Ad Judicium pro Domina Regina, & præfat. Querente, Curia procedere non debet, quia manifeſte apparet, per informat. dict. Querent. quod ipſe non fuit pars gravata, quod per calumniam in dicta informatione ſpecificat. ac per jurament. dict. Lancelot ſuper inde fact. dictus Querens, non fuit damnificat. ſed in calumnia prædict. & jurament. prædict. ſuper inde factum tendebat in commodum ipſius Everardi, propter quod ipſe idem Everardus tempore calumniæ prædict. exiſtens tenens Tenementorum prædictor. per dict. declarat. ſpecificator. eadem Tenementa ratione calumniæ prædict. ac prædict. jurament. tenebat & proficua inde provenientia diutius quam aliter ſi præſens Triatio habita fuiſſet ſine aliqua calumnia tenere potuiſſet. See the Statute of 5 Eliz. againſt Perjury, the words are, grieved, letted, or moleſted, &c.

Mich. 30 *Eliz.* In the Kings-Bench.

LIV. George ap Rices *Caſe.*

GEorge ap Rice, Tenant in Tayl after poſſibility of Iſſue extinct, aſſigned his Eſtate to one A. againſt whom he in the Reverſion brought a Quid juris clamat, and it was adjudged that he ſhould Attorn; for although Tenant in Tayl after poſſibility of Iſſue extinct, himſelf is not compellable to attorn, yet his Aſſignee ſhall attorn; for the privilege is knit to the perſon who is in truth Tenant in Tayl after poſſibility of Iſſue, which cannot be the Aſſignee, for by the Aſſignment the privity and the privilege are deſtroyed. And where the Defendant, in a Quid juris clamat, is adjudged to attorn, Diſtreſs infinite ſhall iſſue forth againſt him, to compel him to attorn; and if he, when he appears, doth refuſe to attorn, he ſhall be impriſoned until he doth attorn: And this Judgment, That the Aſſignee of Tenant in Tayl after poſſibility ſhould attorn, being given in a Court in Wales, was afterwards affirmed in a Writ of Error brought upon it in the Kings Bench.

30 *Eliz.* In the Common Pleas.

LV. Lucas *and* Picrofts *Caſe.*

THe Caſe was, That an Aſſiſe of Novel diſſeiſin was brought in the County of Northumberland of two Acres of Land; and as to one Acre, the Defendant pleaded a Plea tryable in a Foreign County, upon which the Iſſue was adjourned into the Common Pleas, and from thence into the Foreign County, where by Niſi prius it was found for the Plaintiff: And now Snag, Serjeant, prayed Judgment for the Plaintiff, and cited the Book of 16 H. 7. 12. where Aſſiſe is adjourned in Bank for difficulty of the Verdict, they there may give Judgment. But the whole Court is of contrary Opinion; for here is another Acre, the Title of which is to be tryed before the Juſtices of the Aſſiſe, before the Tryal of which no Judgment ſhall be given for the Acre for which the Title is found: And the Aſſiſe is properly depending before the Juſtices of the Aſſiſe, before whom the Plaintiff may diſcontinue his Aſſiſe: And it is not like unto the Caſe of 6 Aſſ. 4. 8 Aſſ. 15. where in an Aſſiſe, a Releaſe dated in a Foreign County is pleaded, which was denyed, for which cauſe the Aſſiſe was adjourned in Bank, and there found by Inqueſt not the Deed of the Plaintiff: now the Plaintiff, if he will releaſe his damages, ſhall have Judgment of the Freehold preſently: But in our Caſe, parcel of the Lands put in view both remain not tryed, which the Plaintiff cannot releaſe as he may the damages: And therefore the Court awarded, That the Verdict ſhould be ſent back to the Juſtices of the Aſſiſe.

Mich. 30 Eliz. *In Communi Banco.*

LVI. Povyes *Caſe.*

POvy, an Attorny of the Kings Bench, brought an Action of Treſpaſs there againſt the Warden of the Fleet, who came into the Common Pleas and demanded the Advice of the Court, becauſe he is an Officer of this Court, and therefore ought not to be impleaded elſewhere: But it was ſaid by the Court, That becauſe that the Plaintiff hath alſo his Priviledge in the Kings Bench, as well as the Defendant hath here, this equality of Priviledg ſhall render the parties at liberty; and he ſhall have the benefit of the Priviledg who firſt begins Suit: and ſo the Warden of the Fleet was adviſed to anſwer.

Hill. 29 *Eliz.* In the Common Pleas.

LVII. Inchley *and* Robinſons *Caſe.*

IN an Ejectione Firmæ, it was found by ſpecial Verdict, That King E. 6. was ſeiſed of the Manor and Hundred of Fremmington, and by his Letters Patents granted the ſame to Barnard in Fee, rendering 130 l. per annum, and alſo to hold by Homage and Fealty; and afterwards Queen Mary reciting the ſaid Grant by E. 6. and the Reſervation upon it granted to Gertrude, Marchioneſs of Exeter, the Manor of Fremmington, and the ſaid Rent and Services; and alſo the Manor of Camfield, and other Lands and Tenements, to be holden by the twentieth part of a Knights Fee: Gertrude ſo ſeiſed, deviſed to the Lord Montjoy the Manor of Fremming-

ton, the Mannor of Camfield, &c. and alſo bequeathed divers ſums of mony to be levyed of the premiſſes: and they further found, That the ſaid Rent of 130l. was the full third part of the yearly value of all the Lands and Tenements of the Deviſor. The Queſtion was, If by thoſe words of the Deviſe, Of the Mannor of Fremmington, the Rent and Services of the Mannor did paſs? i. the Rent and the Homage and Fealty reſerved, the Grant of King E. 6. of the Mannor and Hundred of Fremmington? and if the ſaid Rent and Services are iſſuing out of the Mannor? For if the Rent doth not paſs, then the ſame is deſcended to the Heir of the Marchioneſs; and then being found the full and third part of the value, the King and the Heir is fully anſwered and ſatisfied, and then the Inheritance of the reſidue diſcharged, and ſettled in the Deviſee: And if the Rent doth not paſs, then is the Heir of the Marchioneis entitled by the Statute to a third part of the whole.

Shuttleworth, Serjeant, If the Marqueſs had deviſed by expreſs words the ſaid Rent and Services, they could not have paſſed: for as to the Services, they are entire things, as Homage and Fealty, and they cannot paſs by Deviſe in caſe where Partition is to follow, for ſuch things cannot receive any Partition or Diviſion, therefore they are not diviſible; for the Statute doth enable the Proprietor or Owner to deviſe two parts of his Inheritances, in three parts to be divided; i. as Catalla Felonum cannot be deviſed for the reaſon aforeſaid; which was granted by the whole Court. And as to the Deviſe, he argued much upon the grounds of Deviſes, and put a ground put by Fineax, 15 H. 7. 12. where every Will ought to be conſtrued and taken according as the words do import, or as it may be intended or implyed by the words, what the meaning of the Teſtator was out of the words of the Will. See thereof a good Caſe 19 H. 8. 8, and 9. and he relied much upon the Caſe of Bret and Rigden, Plow. 342. So he ſaid in this caſe, becauſe the intent of the Deviſor doth not appear upon the words of the Will, that this Rent ſhould paſs; it ſhall not paſs, for there is not any mention made of any Rent in all the Will.

Fenner contrary, and he argued much upon the favorable conſtruction which the Law gives to Wills, 14 H. 3. Reverſion for Remainder, & è contr. 17 E. 3. 8. A man may make a Feoffment of a Mannor by the name of a Knights Fee, a fortiori in caſe of a Deviſe: and in our caſe the Marqueſs conceived, That the Rent and Services reſerved out of the Mannor of Fremmington was the Mannor of Fremmington; and the Law ſhall give ſtrength to that intention.

Walmſley conceived, That the Rent did not paſs by the name of the Mannor, &c. for this Rent, nec in rei veritate, nor in reputation, was ever taken for a Mannor: Alſo the words, Of the Mannor and Hundred of Fremmington, are put amongſt others which are Mannors in truth; by which it ſeemeth, That the Deviſor did not intend to paſs but one Mannor, and no other Hereditaments, by that Mannor of Fremmington. It is a Rule in Law, That in the conſtruction of a Will a thing implyed ſhall not controul a thing expreſſed: But here, if by implication the Rent ſhall paſs, then the Mannor of Camfield ſhall not paſs, which it was the intent of the Deviſor to paſs, and that by expreſs words. See 16 Elizab. Dyer 330. Clarches Caſe: and ſee 16 Eliz. Dyer 333. Chapmans Caſe. But in our Caſe here, there are not any ſufficient words to warrant any implication; for neither in truth nor in reputation was it taken to be a Mannor: 22 H. 6. 2. Green Acre might paſs by the name of a Mannor, although it were but one Acre of Land, becauſe known by the name of a Mannor. See accordingly 22 H. 6. 39. And ſee, where, before the Statute of Uſes, a man had Recoverors to his uſe, and he wills by his Will, That his Truſtees ſhould ſell his Lands, they may ſell. And he ſaid, That if a man ſeiſed of a

Mannor

Mannor parcell in Demeſne, and parcel in ſervice, and he grants the Demeſnes to one and his heirs, and afterwards deviſeth his Mannor, peradventure the ſervices ſhall paſſe; but this Rent hath no reſemblance to a Mannor.

Gaudy, This Rent ſhall paſſe by the name aforeſaid. Favourable conſtruction is to be alayes given to Wills, according to the intent of the Deviſor, and no part of a Will ſhall be holden void, if by any means it may take effect; then here it appeareth, that his meaning was, that upon theſe words, every thing ſhould paſs to the Deviſee concerning the ſaid Mannor of Fremmington; for otherwiſe, the words of the Mannor of Fremmington ſhould be void and frivolous, which ſhall not be in a Will, if any reaſonable conſtruction can be; for it is found expreſſly by the Jury, That neither at the time of the Will made, nor at the time of the death of the Deviſor, the ſaid Deviſor had any thing in the ſaid Mannor of Fremmington, but only the ſaid Rent of one hundred and thirty pounds. And it may well be taken that the Deviſor being ignorant what thing a Mannor is, though that the Rent was a Mannor, becauſe that he had Rents and ſervices out of the Mannor. For in conſtruction of Wills, the words ſhall ſerve the intent of the party; and therefore if a man Deviſeth, That his Land ſhall be ſold for the payment of his debts, his Executors ſhall ſell them, for the intent of the Teſtator naming the Vendors, is ſufficient: And ſee Plowden, 20 Eliz. 5. 24. L. after the Statute of 27 A. 8. deviſeth that his Executors ſhall be ſeiſed to the uſe of H. and his Heirs in Fee, whereas then there was no Feoffees to his uſe; The ſame was holden a good Deviſe of the Lands of A. and the Judged conceived, that the Deviſor was ignorant of the operation of the Statute in ſuch caſe, and therefore his ignorance was ſupplied: See Br. Deviſes, 44 29 H. 8. A. had Feoffees to his uſe, and afterwards, after the Statute of 27 H. 8. willed that his Feoffees ſhould make an Eſtate to B. and his Heirs, it was holden by Baldwyn, Shelley, and Mountague, Juſtices, that it was a good Deviſe: See 26 H. 6. Feoff. 12. A Carve of Lands may paſſe by the name of a Mannor, Ergo, a multo fortiori, Rent, for Rents and Services have more neerneſſe, and do more reſemble a Mannor then a Carve of Lands; and it cannot be intended, that the meaning of the Teſtator was to grant the Mannor it ſelf, in which ſhe had nothing, eſpecially by her Will; for covin, colluſion, or indirect dealing, ſhall not be preſumed in a Will: Alſo the Marchioneſſe, for four years together before her death, had the Rent and Services of the ſaid Mannor, and ſhe well knew, that ſhe had not any other thing in the ſaid Mannor, but the ſaid Rent and Services; and therefore it ſhall be intended, that that was her Mannor of Fremmington, A. ſeiſed of a Capitall Meſſuage, and great Demeſnes lying to it, Leaſeth the ſame for years, rendring Rent, and afterward deviſeth to another all his Farm, lying in ſuch a place, It was rated in that caſe, that by that Deviſe, the Rent and the Reverſion ſhould paſſe: See the Caſe betwixt Worſelie and Adams, Plowd. 1 Eliz. 195. by Anthony Brown and Dyer. Periam Juſtice, was of opinion, that this Rent might be divided well enough; But by Anderſon, It is but Rent-ſeck; but Periam ſaid, it was a Rent diſtrainable of common Right, but all of them agreed, that the Rent might be divided, but there ſhould not be two Tenures. And the Lord Montjoy being adviſed that this Rent did not paſſe by the Grant, but deſcended to the Heir, being the full part of the whole, entred into all the reſidue of the Lands, and made a Leaſe of the Mannor of Camfield unto the Plaintiff, upon which entry, the Ejectione firmæ was brought, and afterwards the Plaintiff ſeeing the opinion of the Court to be againſt him, and for the Deviſee of the Rent by the name aforeſaid, did afterward diſcontinue his ſuit, &c.

Trin.

Trin. 30 *Eliz. Intrat. T.* 28 *Eliz. Rot.* 507. In the Common Pleas.

LVIII. Coſtard *and* Wingfields *Caſe.*

IN a Replevin, the Defendant did avow for damage-feaſant, by the commandment of his Maſter, the L. Cromwel; The Plaintiff by way of Replication did juſtifie the putting in of his cattell into the Land, where, &c. by reaſon that the Town of N. is an ancient Town, & that it had been uſed, time out of minde, &c. That every inhabitant of the ſaid Town, had had common for all manner of cattel levant and couchant within the ſaid Town, and ſo juſtified. The Defendant ſaid, that the houſe in which the Plaintiff did inhabite in the ſaid Town, and by reaſon of reſidencie, in which houſe he claimed common, was a new houſe, erected within 30 years; and that before that time, there had not been any houſe there, upon which the Plaintiff did demurre: Shuttleworth Serjeant, argued for the Plaintiff, That he ſhould have common there by reaſon of Reſiancie in the ſaid new houſe; and he ſaid, That the Reſiancie is the cauſe, and not the Land, nor the perſon thereof; and thereupon he put the Caſe of 15 E. 4. 29. And he agreed the Caſe, That if the Lord doth improve part of the Common, that he ſhall not have common in the reſidue of the Land, for the Lands improved, becauſe, That he cannot preſcribe for that which is ſo improved, as the Book is, in 5 Aſſ. But here in the principall Caſe he doth not preſcribe in any perſon, certain, or in, or for any new thing; but he ſets forth, that the uſe of the Town hath alwayes been, that the inhabitants ſhould have common there, And this common is not common appendent, or appertinent, but common in groſſe, See Needham, 37 H. 6. 34. b. And he ſaid, That if the houſe of a Freeholder, which hath uſed to have ſuch common, doth fall down, and he erecteth a new houſe in another place of the Land, that he ſhall have common to that new erected houſe as he had before? And he took a difference betwixt the Caſe of Eſtovers, where a new Chimney is erected, and this Caſe, and he ſtood much upon the manner of the preſcription. Gawdy, Serjeant, contrary, And he tooke exception to the preſcription; For he ſaid, that it is ſaid therein; That it is Antiqua Villa, but he doth not ſay, that it hath been ſo time out of minde, &c. and ſo it ought to be ſaid, as the Book is in 15 E. 4. 29. a. And then, if it be not an ancient Town time out of minde, the parties cannot preſcribe as Inhabitants of the ſaid Town, to have common time out of minde, &c. And he ſaid, That if ſuch a preſcription as is ſaid in this Caſe be good in Law, viz. That every one who erected a new houſe within the ſaid Town, ſhould have common to his ſaid new houſe, the ſame ſhould be prejudiciall to the ancient Town, and to the utter overthrow and manifeſt impairing of the common there; and it might ſo happen, that one who had but little lands in the ſaid Town, might erect twenty new houſes there, and ſo an infinite number of houſes might be newly erected there; and there ſhould be common allowed to every inhabitant within the ſaid new erected houſes, which ſhould be inconvenient and unreaſonable. Anderſon, chief Juſtice. He who erects a new houſe, cannot preſcribe in the common, for then a preſcription might begin at this day, which cannot be; and he inſiſted much upon the generall loſſe which ſhould happen to the ancient Tenants, if ſuch a preſcription for new erections ſhould be good. Periam, If it ſhould be Law, That he ſhould have common in this Caſe, That all the benefit which the Statute gives to the Lord for improvement, ſhould be taken away by ſuch new edifications & erections of new houſes, which were not reaſonable; And ſuch was the opinion of the other Juſtices, and there-

fore

foꝛe they all agreed, that in the pꝛincipall caſe, the Plaintiff ſhould not have common to his new erected houſe; but the entry of the Judgement was reſpited untill the Court had ſeen the Recoꝛd, and after they had ſeen and conſidered upon the Recoꝛd, Anderſon and Periam were of opinion as befoꝛe: But Windham did encline to the contrary; but they all agreed, That he who ſet up again a new Chimney where an old one was befoꝛe, ſhould have Eſtovers to the ſaid new Chimney: and ſo if he build a new houſe upon the foundation of an old houſe, That he ſhould have common to his ſaid houſe new erected: So if a houſe falleth down, and the Tenant oꝛ Inhabitant ſets up a new houſe in the ſame place: Alſo if a man hath a Mill, and a watercourſe to it time out of minde, which he hath uſed time out of minde to cleanſe, if the Mill falleth, and he erecteth a new Mill there, he ſhall have the watercourſe, and liberty to cleanſe it, as he had beforꝛe, and afterwards the ſame Term, Judgement was given foꝛ the Defendant, to which Windham Juſtice agreed.

Hill. 29 *Eliz.* In the Kings Bench

LIX. Rous *and* Artois *Caſe.*

THe Caſe was large, But the points in this caſe were but two: The firſt was, If Tenant per auter vye, after the death of Ceſtuy que vye holdeth over. If he be a Diſſeiſoꝛ oꝛ not: The ſecond point was; If Tenant at will, oꝛ at ſufferance, be ſuch a Tenant of the Manno; as he may grant Copihold Eſtates to Copiholders: Foꝛ the firſt point; It was agreed by Godfrey, and he held, that as the pꝛincipall caſe was, That if Tenant pur auter vye holdeth over the life of Ceſtuy que vye, that he thereby gaineth the Fee; But he granted the Caſes, That where a man holdeth at the will of another, that after the Eſtate determined, if he holeth over, he hath not thereby gained Fee, foꝛ he is Tenant at ſuerffance; and as Littleton ſaith in his Chapter of Releaſes, 108. Tenant at ſufferance, is where a man of his own head occupieth the Lands and Tenements at the will of him who hath the Freehold; and ſuch an occupier claims nothing but at will; But he ſaid, That in the pꝛincipall Caſe, he otherwiſe claimed then at the will of the Leſſoꝛ; foꝛ that it appeareth, that he hath granted Copie: and he ſaid, that this difference doth give anſwer to the Caſe which is, 1. H. 8. br. 1. per Copy 18. where it is ſaid foꝛ Law, That none is Tenant at ſufferance, but he who firſt enters by authoꝛity of Law: As if a man makes a Leaſe foꝛ years, oꝛ foꝛ the life of another, and he holdeth the Lands after his term expired, oꝛ after the death of Ceſtuy que vye; If he claim nothing but at the will of him who hath the Freehold; he is a Tenant at ſufferance. But if he holdeth in the lands againſt the will of his Leſſoꝛ, then he is a Diſſeiſoꝛ; and ſo if he do act after ſuch continuance of poſſeſſion, contrary to the will of his Leſſoꝛ, he is a Diſſeiſoꝛ, 10 E. 4. If an Infant maketh a Leaſe at will, and the Leſſoꝛ dieth, and the Leſſee continueth in poſſeſſion, and claims Fee, the Heir ſhall have Mordanceſter, 18 E. 4. If Ceſtuy que vye dieth, and the Tenant holds in, and was impleaded, The Leſſoꝛ ſhall not be received, and he conceived the reaſon of the Caſe to be, becauſe that the Reverſion was not in him; but that the Fee was gained and reſted in the other, 22 E. 4. 39. g. by Huſſey. If a Termoꝛ holdeth over his term, there an Eſtate in Fee is confeſſed to be in him, becauſe he holdeth the poſſeſſion of the lands by wꝛong; but there is a Quære made of it, if he be a Diſſeiſoꝛ oꝛ not, but I conceive that he is, foꝛ Treſpaſſe doth not lie againſt him, beforꝛe the Leſſoꝛ hath made his entry; and therefoꝛe, if the Leſſee doth continue in the poſſeſſion of the lands by reaſon of the firſt entry; that is the

reaſon, as I conceive, that the Writ of Entre ad tremiuum qui præteriit, lieth againſt ſuch a Termor, who holds ſo over his Term; and that Writ is a Præcipe quod reddat, which doth not lie but againſt a Tenant of the Freehold. And ſuch is the opinion of Tilney, 7 H. 4. 43. That if the Guardian holds in the Lands at the full age of the Heir; or if the Tenant for years after the term expired, holdeth over the Lands, their Eſtates ſhall be adjudged a Fee. And in our Caſe here, he doth not claim to hold in at the will of the Leſſor, for he hath done an act contrary to the will of the Leſſor; For he being Lord of the Mannor, in manner as aforeſaid, hath granted Eſtates by Copy; and it is holden, 12 E. 4. 12. by all the Juſtices, That if Tenant at will, or Tenant at ſufferance at will, makes a Leaſe for years, that the ſame is a Diſſeiſin to the Leſſor, and the Tenant at will thereby gains the Freehold: and the reaſon of the Book ſeems to be, becauſe he claims to hold a greater Eſtate then of right belongs unto him. The ſecond point was, If Tenant at ſufferance might grant Copies, and he ſaid, that he might, and ſuch grant ſhould be good, becauſe he is in by lawfull means, and an Aſſiſe doth not lie againſt him, as in the Book of 22 E. 4. 38. before, and he is Dominus pro tempore. And this Caſe is not like to the Caſes, where Copies are made by Abators or Diſſeiſors; for the Law doth adjudge, that Copies made or granted by them are void, and his act here as a Tenant at ſufferance of making and granting of the Copies ſtands with the cuſtom of the Mannor which warrants them; as in the Caſe of Grisbrook and Foxe, if an Adminiſtrator made by the Ordinary ſells the goods of the Inteſtate; and with the money thereof ariſing, payeth the debts of the Inteſtate, and afterwards he who was made Executor proves the Will, he ſhall not avoid ſuch ſale of the goods, becauſe he hath made it according to Law, and hath done no more then an Executer is compelled to do: So 12 H. 6. If a Baily cut down trees to repair an ancient pail, the ſame is good: So 16 H. 2. If he payeth a Quit Rent, it is good. And note, 4 Mariæ Br. Tenant by Copy, 27. That the Leſſee of a Mannor, in which there are Copiholds, after the death of the Copiholder, may admit the Heir of the Copiholder to the Land; and ſo he may do, who hath but an Eſtate in the Mannor durante bene placito: and yet it ſeems by the Book, that ſuch a Tenant of the Mannor, cannot reſerve and leſſen Rent, but he ought to reſerve the ancient Rent, or more. Coke contrary; And firſt he ſaid, that he who holdeth over the life of the Ceſtuy que uſe, doth not gain any Fee where he comes in firſt by right, for that he is but Tenant at ſufferance, 35 H. 8. Dyer 57. in the Caſe of the Lord Zouch, Ceſtuy que uſe for life, the remainder over in tail makes Leaſe for life of the Leſſee, he dieth, the Leſſee continueth his Eſtate, and the opinion of the Juſtices of the Common Pleas, and of others was, that he is but a Tenant at ſufferance, for the Leaſe was not any diſcontinuance of the Remainder, becauſe he had authority by the Statute of H. 3. to make a Leaſe, and that is intended of ſuch Eſtate which he might lawfully do; and this is our Caſe, and ſo it is adjudged already. As to the ſecond point, I grant, that Tenant for years, or at will, or at ſufferance is Dominus pro tempore; but there is a difference as unto granting of Copies by them: For it was adjudged 25 Eliz. that they might grant Copies which are to be granted upon ſurrenders, made by Copiholders: As if a Copiholder doth ſurrender to the uſe of another, they may accept of ſuch a ſurrender, and grant the lands by Copy to him to whoſe uſe the ſurrender is made; But if a Copiholder dieth, they cannot grant voluntary Copies de novo. And he ſaid, That Popham, who argued the ſaid Caſe in 25 Eliz. That this difference was agreed, and ſo adjudged in one Sleers Caſe. And ſo 17 Eliz. in the Caſe of one Stowley, where the Caſe was, That a Mannor was Deviſed to one, and the Deviſee entred and granted Copies, and afterwards it was found that the Deviſe was void, and it was there holden,

that

that Copies made by ſuch Deviſee upon ſurrenders, were good, and were not to be avoided; but contrary of Copies made after the death of Tenants upon voluntary grants. I grant, that when Ceſtuy que uſe dieth, the Eſtate for life is utterly void and gone; and therefore he is in by wrong, but he cannot thereby gain ſo great an Eſtate as a Diſſeiſor, becauſe he came in at the firſt by right. Atkinſon put a difference betwixt Tenant at will, and Tenant at ſufferance; for Tenant at will ſhall have aid, but contrary, of Tenant at ſufferance, as the Book is, 11 H. 4. a Releaſe to Tenant at will is good, contrary to Tenant at ſufferance; when after the death of Ceſtuy que uſe he holdeth over, he hath ſome intereſt, ſcil. to this purpoſe, that he ſhall not be a wrong doer, for he is neither Abator nor Diſſeiſor, therefore not a wrong doer, and then if he be in by a right, or rightfully, he is then Dominus pro tempore, and then the grants made by him by Copy are good. 7 H. 7, 3. Tenant at ſufferance, was to juſtifie the diſtraining the cattell of another damage feaſant. Coke. True, it is, the beaſts of a ſtranger, but not of the Tenant of the freehold: Gawdy Juſtice, The Leſſor cannot have Treſpaſſe againſt him before entry; not becauſe he is not a wrong doer, but becauſe it is his folly that he doth not enter: All the Juſtices did hold with the Plaintiff againſt the Copy granted; and that he which granted it was but Tenant at ſufferance, and not a Diſſeiſor, nor had gained the Fee, becauſe he came in firſt by right: And therefore they awarded, that if the Defendant did not ſhew better cauſe, that Judgement ſhould be entred for the Plaintiff.

LX. *Trin.* 29. *Eliz.* In the Exchequer.

IN the Exchequer Chamber, there was this Caſe: An Indenture Tripartite, was betwixt three, A. was one of them, and he covenanted with them, Et quolibet eorum. And the Covenant was, that the Land which he had aliened to one of them, was diſcharged of all incumbrances; and he to whom the limitation of the Lands was, but a Writ of Covenant ſole. Buckley argued, that it was wel brought, and cited the Caſe of 6 E. 2. Br. Covenant 49. where one covenanted with twenty, to repair the Sea-bancks, and he did not repair againſt two of them, and they two brought a Writ of Covenant ſolement, and the Writ holden maintainable, becauſe they onely were damnified, and ſo he ſaid in this Caſe: But notwithſtanding this, it was afterwards, viz. M. 30 Eliz. adjudged by the whole Court, that the Covenant did not lie by one of them only, but ought to be brought by them both.

5 Co. Kingſton's Caſe. Skinner 401 Carthew 98 Comb. 163.

Mich. 33 *Eliz.* In the Common Pleas.

LXI. Carters *Caſe.*

A Being ſeiſed of the Manor of Staple in Odiham, and of divers other Lands in Odiham, ſuffered a common Recovery of the whole, and by Indenture expreſſed the uſes in this manner, viz. of all his Lands and Tenement, in Odiham, to the uſe of his wife for life, the remainder over, &c. And of the Manor of Staple, to the uſe of his youngeſt ſon in tail; and by the cleer opinion of the whole Court, although the Manor of Staple was in Odiham, yet the wife ſhall have nothing therein; for the intent of the party was, that the ſon ſhould have the ſame, and his wife the reſidue; and accordingly Judgement was given.

Mich.

Mich. 33 *Eliz.* In the Common Pleas.

LXII. Cobb *and* Priors *Case*.

THe Case betwixt Cobb and Prior was this; A man seised of Lands in Fee, devised the same to his Wife during the minority of his Son, upon condition, that she should not do Waste during the minority of the said Son, and dyed; The Wife marryed a Husband, and dyed; the Husband committed Waste: It was holden by all the Justices, That the same was not any breach of the Condition; and Judgment was entered accordingly. *S. C. cited* 35

Trin. 33 *Eliz.* In the Common-Pleas.

LXIII. Taylor *and* Brounsals *Case*.

IN an Information upon the Statute of 32 H. 8. by Taylor against Brounsal, the Case was, That John Brounsal was seised, and gave the Lands to T. B. and the Heirs of his body, &c. the Remainder to R. B. and the Heirs males of his body, the Remainder to the right Heirs of J. B. T. B. dyed, having issue a Daughter; and R. B. made a Lease for years of the Lands: And it was holden by the Court to be no maintenance within the said Statute, for he in the Remainder might make a Lease for years: Then it was given in Evidence, That a common Recovery was had against the Husband and Wife with a single Voucher, and so the Remainder limited to R. B. destroyed, and that after that Recovery R. B. made the Lease: To which it was said by the other side, That the said Recovery was never executed, and no discontinuance of the Remainder, and then the Lease made by R. B. was good: and the truth of the Case was, That such a Recovery was had, and an Habere facias seisinam awarded and returned, but no Execution was in truth had upon it, nor the Recoveror never entered: And if R. B. who is a stranger to the said Recovery, shall be admitted against the Recovery to say, That no Execution was thereof, was the Question? and therefore all the matter was found by special Verdict. It was also given in Evidence, That the Land was given to T. B. and the Heirs males of his body; and then when the Daughter, which is not in truth inheritable, entereth, if that Entry, she being privy in blood to R. her Uncle, shall be a Disseisin, or Abatement, &c. as in the Case of Littleton, where the youngest Brother entereth after the death of the Father; for in such case, the youngest Son doth not get any Freehold, but is but a Tenant at sufferance. Anderson, When the Daughter enters, and takes a Husband, who leaseth for years, and the Lessee entereth, the same is a Disseisin. Periam doubted it, for he said, When the younger Son entered, the Freehold was in him, which Anderson doubted.

Trin. 33 *Eliz.* In the Common Pleas.

LXIV. Maunsel *and* Vernons *Case*.

IN Debt by Maunsel against Hen: Vernon Esquire, who came in by Capias, i. a compulsary Proces, and pleaded, That he was Hen: Vernon Lord Powis, and so a Baron of the Parliament, and demanded Judg-

ment

ment of the Writ. (Note, ſome ſaid, That if the Defendant had come in by ſummons, or gratis, and not by compulſary Proces, he could not have pleaded this Plea, or any other Miſnomer.) The Plaintiff replyed, That the Defendant is an Eſquire, abſque hoc, that he is Lord Powis, and a Baron of the Parliament; and as the Jury was ready at the Bar to try that Iſſue, this matter was objected. And Anderſon conceived, That this Plea to the Writ was not good, for the name of Lord is not any degree, as Knight, Duke, Earl; nor is it parcel of the name, nor parcel of addition; and therefore it is no Plea in abatement of a Writ: and all the Writs of Parliament directed to Barons to ſummon them to Parliament, ſhall have their Names, Sirnames, and Additions: as if they be Knights, Knights, and if Eſquires, they ſhall be named Eſquires; and if a Bond be made by J. S. Lord R. the Writ ſhall not be ſo, for the King by his Writ doth not name any one Lord; but otherwiſe it is of Duke, Earl, &c. for theſe are Offices of Dignity, and parcel of their Names, and not onely Additions. Windham and Periam contrary; and they conceived that there was no difference in this point betwixt a Lord and an Earl; for which cauſe the Court being in doubt, although that the Exception was entered of Record, would have ſaved the ſame to the party, and taken the Jury de bene eſſe: but afterwards, becauſe it appeared, was joyned in the prejudice of Sir Edward Herbert, who was a ſtranger thereunto, and whoſe Title was concerned therein; and there was none on his part to inform the Jury: the Jury was at laſt diſmiſſed by the Court.

Trin. 28 *Eliz.* In the Kings Bench.

LXV. Penruddock *and* Newmans *Caſe*.

IN an Ejectione Firmæ by Penruddock againſt Newman, the Plaintiff declared of a Leaſe made by the Lord Morley, and upon Not-guilty pleaded, the Jury found this ſpecial matter, (ſcil.) That W. Lord Mountcagle ſeiſed of the Manor of D. whereof, &c. became bound in a Statute in ſuch a ſum of Mony to A. who dyed; the Executors of A. ſued Execution againſt the ſaid Lord, (ſcil.) Extendi facias, a Liberate iſſued, upon which the ſaid Manor was delivered to the Executors, but the ſaid Liberate was not returned: and it was further found, That the Executors being ſo poſſeſſed of the Manor, the Lord commanded a Court Baron to be holden there, which was done by ſufferance and permiſſion of the Executors, and in their preſence: at which time the Executors ſaid to the Lord the Conuſor, We have nothing to do with this Mannor. And upon this Verdict ſeveral matters were moved.

1. If the Execution were well done, becauſe the Writ of Liberate was not returned? and as to that, divers Books were cited, 21 H. 6. 8. 18 E. 3. 25. And there is a difference betwixt a Liberate, and a Capias ad ſatisfaciend. and Fieri facias, theſe VVrits are conditional, Ita quod habeas corpus, &c. Ita quod habeas denarios hic in Curia, 3 H. 7. 3. 16 H. 7. 14. but contrary in a VVrit of Habere facias ſeiſinam, or in a Liberate, for in theſe Writs there are not ſuch words; and therefore although they be not returned, Execution done by vertue of them is good enough: See 11 H. 4. 212. If the Sheriff by force of an Elegit doth deliver the moyety of the Land, and doth not return the VVrit; if the Plaintiff will plead a new Action of Debt, the Defendant may plead in Bar the Execution aforeſaid, although the VVrit be not returned, nor doth remain upon Record: and it is not like unto the Caſe of Partition made by the Sheriff, for that muſt be returned, becauſe that after the Return of it, a ſecondary Judgment is to

be given, (ſcil) Quod Partitio prædict. firma & ſtabilis remaneat in perpetuum, firma & ſtabilis in perpetuum tenentur, ſays the Book of Entries 114. And Egerton, the Solliciter-General, cited a Caſe to be lately adjudged betwixt the Earl of Leiceſter and the Lady Tanfield, That ſuch an Execution was well enough, although the Liberate was not returned.

Earl of *Leiceſter* and *Tanfields* caſe.

The ſecond point was, Admitting that it be a good Execution, If the Executors being in poſſeſſion of the Manor, and ſuffering the Conuſor to hold a Court there, and ſaying the words aforeſaid in the preſence of the Lord the Conuſor; if the ſame doth amount unto a Surrender, or not? And it was the Opinion of VVray chief Juſtice, That it was not a Surrender, for that here the words are not addreſſed to the Conuſor, who was capable of a Surrender, but to other perſons: And it is not like unto the Caſe of 40 E. 3. 23, 24. Chamberlains Aſſiſe, where Tenant for life ſaith to him in the Reverſion, That his Will is, that he enter upon the Land; the ſame is a good Surrender, becauſe here is a perſon certain who may take the Land: but in our caſe, it is but a general ſpeech, and therefore it ſhall not be a Surrender.

Mich. 29 *Eliz.* In the Common Pleas.

LXVI. Baskervile *and Biſhop of* Herefords *Caſe.*

IN a Quare Impedit brought by VValter Baskervile againſt the Biſhop of Hereford, and others; the Plaintiff counted, That Sir Nicholas Arnold Knight, was ſeiſed of the Advowſon in groſs, and granted the ſame to the ſaid Baskervile and others, to the uſe of himſelf for life, and afterwards to the uſe of Richard Arnold his Son in tayl: Proviſo, That if the ſaid Nicolas dyed, his Heir being within the age of twenty three years, that then the Grantees and their Heirs ſhould be ſeiſed to themſelves and their Heirs, until the ſaid Richard had accompliſhed the ſaid age. Sir Nicolas dyed, Richard being but of the age of fourteen years; by force whereof the Grantees were poſſeſſed of the ſaid Advowſon, &c. and afterwards the Church became voyd, and ſo it appertained to them to preſent.

Exception was taken to the Count by Serjeant Gawdy, becauſe the Plaintiff had not averred the life of Richard, upon whoſe life the intereſt of the Plaintiff did depend: and he compared the ſame to the Caſe of the Parſon, which had been adjudged, where the Leſſee of a Parſon brought an Ejectione Firmæ, and it was found for him; and in Arreſt of Judgment Exception was taken to the Declaration, becauſe the life of the Parſon was not averred; and for that cauſe the Judgment was ſtayed.

Anderſon, Upon the dying of Sir Nicolas, Richard being but of the age of fourteen years, an abſolute Intereſt for nine years veſted in the Grantees, not determinable upon the death of Richard; or rather, they are ſeiſed of a Fee determinable upon the coming of Richard to the age of 23 years.

Rhodes and VVindham Juſtices, contrary; and that here is an Intereſt in the Grantees determinable upon the death of Richard within the term; for if Richard dyeth without iſſue within the term, the Remainder is limited over to a ſtranger.

And as to the Exception to the Count, it was argued by Puckering Serjeant, That the Count was good enough; for although the life of Richard be not expreſly added, yet ſuch an averment is ſtrongly implyed, and ſo ſupplyed: For the Count is, Quod dictus Nich: obiit, dicto Richardo being of the age of fourteen years, & non amplius, by force of which the Plaintiff was poſſeſſed of the ſaid Advowſon, quo quidem ſic poſſeſſionato exiſtente, the Church voyded: and poſſeſſed he could not be, if not that

the

the ſaid Richard had then been alive; and that is as ſtrong as an Averment: See 10 E. 4. 18. In Treſpaſſe for breaking of his Cloſe, the Defendant pleaded, That A. was ſeiſed, and did enfeoff him, to which the Plaintiff ſaid, That long time before A. had any thing, B. was ſeiſed, and Leaſed to the ſaid A. at will, who enfeoffed the Defendant, upon whom B. re-entred, and Leaſed to the Plaintiff at will, by force whereof he was poſſeſſed, untill the Defendant did the Treſpaſſe; and that was allowed to be a good Replication without averring the life of B. who Leaſed to the Plaintiff at will, for that is ſupplied by the words, ſcil. virtute cujus, the Plaintiff was poſſeſſed untill the Defendant did the Treſpaſſe: See alſo, 10 H. 7. 12. In an Aſſiſe of Common, The Defendant made Title, that he was ſeiſed of a houſe and a Carve of Land, to which, he and all thoſe whoſe Eſtate he hath, &c. had common appendant, and doth not ſay, That he is now ſeiſed of the houſe; but the exception was diſallowed; for ſeiſin ſhall be intended to continue untill the contrary be ſhewed.

Trin. 29 *Eliz.* In the Kings Bench.

LXVII. Morgan *and* Chandlers *Caſe.*

IN Debt for Arrerages of Rent, by Morgan againſt Chandler, It was found by ſpeciall Verdict, That the Land out of which was aſſured by an Act of Parliament to the Marchioneſſe of Northampton for the term of her life, the remainder to the Lady Bourcher her daughter, and the heirs males of her body, the Remainder to King H. 8. in Fee; And it was ordained by the ſame Act, Quod omnes conceſſiones & dimiſſiones, Anglice, Grants and Leaſes, factæ vel in poſterum fiendæ, by the ſaid Marchioneſſe, of the Lands aforeſaid, per ſcipt. Indentat. dict. Marchio. bonæ & validæ in Lege erunt, durante termino, &c. The Marchioneſſe made a Leaſe for 21 years to Kenelm Throgmorton, rendring 10 l. Rent, who aſſigned the ſame to the Defendant. The Lady Bourchier died without iſſue, the Marchioneſſe died; and if the Leaſe ſhould now binde the Queen, was the Queſtion: And it was moved by Clark of Lincolns Inne, That it ſhould, for the King was party to the Act of Parliament; and thoſe Eſtates for life in Tail, and in Fee, are all as one Eſtate, and derived out of one Eſtate, and the Eſtate of the King is bound with the Leaſe; and it was moved by Broughton, That the Leaſe ſhould not binde the Queen, and ſo by conſequence not her Patentee; and he cited a Caſe, adjudged upon a like Act, ſcil. the Statute of 35 H. 8. by which it was enacted, That the Lady Katherine, wife of the ſaid King, ſhould be as a Feme ſole, and that ſhe might make Leaſes, &c. In that caſe, the Leaſes ſhould not binde the King or his ſucceſſors; for the ſaid Act did not extend to make the Leaſes good, but onely againſt Coverture. And it was obſerved by Clench, Juſtice, that in the Act of Parliament now in queſtion, It is expreſly provided, that the Rent reſerved by the Marchioneſſe, ſhould go to the Lady Bourcher, but no proviſion made, that it ſhould go to the King, and therefore it is not reaſon that the King ſhould be bounden: But another matter ariſing upon the pleading, the point did not fall in Judgement.

Trin. 29 *Eliz.* In the Kings Bench.

LXVIII. Backhouſe *and* Spencers *Caſe.*

SAmuel Backhouſe brought a Writ of Annuity againſt Alderman Spencer of London, and declared upon a Grant of an Annuity for term of years, and

and depending the Action, the term expired, and it was the clear opinion of the whole Court, that the Plaintiff could not have Judgement, for the Judgement in this Writ, is, Quod querens recuperet annuitatem prædictam, and now there is not any Annuity in being. See 34 H. 6. 20.

LXIX. *Mich.* 29 *Eliz.* In the Common Pleas.

IN a Writ of Partitione facienda, The Defendant prayeth in Aid; and the Plaintiff counterpleads the Aid, upon which counterplea, they are at iſſue, and it is found for the Plaintiff: It was adjudged, that the ſame is peremptorie to the Defendant; and the Judgement ſhall be, Non quod reſpondeat, ſed quod Partitio fiat, &c.

Mich. 29 *Eliz.* In the Common Pleas.

LXX. Rolſton *and* Chambers *Caſe*.

ROlſton brought an Action of Treſpaſſe upon the Statute of 8 H. 6. of forcible entry, againſt Chambers, and upon iſſue joyned, it was found for the Plaintiff, and damages aſſeſſed by the Jury, and coſts of ſuit alſo, and coſts alſe de incremento adjudged, an all were trebled in the Judgement, with this percloſe Quæ quidem damna in toto ſe attingunt ad, &c., and all by the name of damages; and it was objected againſt this Judgement, That where damages are trebled, no coſts ſhall be given, as in Waſt, &c. But afterwards it was cleerly agreed, that not onely the coſts aſſeſſed by the Jury, but that which was alſo de incremento adjudged, ſhould be trebled, and ſo were all the Preſidents, as it was affirmed by all the Preignothories; and ſo are many Books, ſcil. 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4. 1. Book of Entries, 334. and Judgement was given accordingly: It was alſo agreed, that the party ſo convicted of the force at the ſuit of the party, ſhould be fined, notwithſtanding that he was fined before upon an Indictment for the ſame.

Mich. 29 *Eliz.* In the Common Plea.

LXXI. Wrenne *and* Bulmans *Caſe*.

WRenne brought an Action upon the Statute of 1 and 2 of Phil. & Ma. for unlawfull impounding of Diſtreſſes againſt Bulman, and was Nonſuit, and it was moved by Shuttleworth Serjeant, If the Defendant ſhould have coſts upon the Statute of 23 H. 8. and it was adjudged, that he ſhould not; and that appears cleerly by the words of the Statute, &c. For this Action is not conceived upon any ſuch matter which is compriſed within the Statute: And alſo the Statute upon which this Action is conceived, was made after the ſaid Statute of 23 H. 8. which gives coſts, and therefore the Statute of 23 H. 8. and the remedy thereof cannot extend to any Action given by 1 and 2 Phil. & Ma. And ſo Rhodes Juſtice, ſaid it was adjudged 8 Elizabeth.

Mich.

Mich. 29 *Eliz.* In the Common Pleas.

LXXII. Mery *and* Lewes *Caſe.*

MEry brought and Action upon the Caſe againſt W. Lewes, Executor of David Lewes, late Maſter of Saint Katherine, juxta London, and declared, That the ſaid David in conſideration; that whereas Quædam pars domus fratrum & ſororum Sanctæ Katherin. fuit vitioſa & in decaſu, The ſaid Mery ad requiſitionem dicti Davidis repararet eandem, aſſumed to pay to the ſaid Mery all ſuch moneys that the ſaid Mery expenderet in ſuch reparations; And farther declared, That eandem partem Domus prædict. reparavit, &c. and upon Non aſſumpſit, it was found for the Plaintiff; In Arreſt of Judgement it was objected, That the count was too generall, Quædam pars domus: For the Plaintiff ought to have ſhewed ſpecially, what part of the houſe in certain, as Hall, Chamber, or other rooms, but the ſame was not allowed: Another Objection was, becauſe it is ſet forth in the conſideration, that the Plaintiff, Ad requiſitionem dict. Davidis repararet; and the Plaintiff declared, Quod reparavit generally, without ſaying, ad requiſitionem dict. Davidis reparavit, and that is not the reparation intended in the Declaration, ſcil. Reparatio ad requiſitionem, but a reparation of his own head, and at his pleaſure, and for that Caſe Judgement was reverſed.

allegr. 26
1 Lill abr. 349
1 Plowd. 29

Mich. 29 *Eliz.* In the Common Pleas.

LXXIII. Braſiers *Caſe.*

NOte, It was agreed in the Caſe by all the Juſtices, and by the Preignochories, That if the Diſſeiſor levie a Fine, and the Diſſeiſee in the preſervation of his right againſt the ſaid Fine, enter his claim in the Record of the foot of the Fine, that the ſame is not any ſuch claim as ſhall avoid the Statute of 4 H. 7. See for this Caſe of the Lord Zouch, in Plowdens Commentaries.

Trin. 29 *Eliz.* In the Kings Bench.

LXXIV. Ralph Morris *Caſe.*

RAlph Morris and his wife, libelled in the Spirituall Court, for that the Defendant called the wife of one of the Plaintiffs, Veneficam, Sortilegam, & Incantatricem Dæmoniorum; and now came the Defendant into this Court, and ſurmiſed, that the matter of the Libell is determinable by the Common Law, and thereupon prayed a Prohibition, and it was holden by the Court, That although the offence of Witcherie be in ſome caſes triable by Law, yet the ſame doth not take away the juriſdiction of the Spirituall Court; and therefore, to call one a Witch, generally an Action will not lie at Law, as it hath been adjudged; But to ſay, that he hath bewitched ſuch a one, an Action will lie at Law. Wray. Such Witchcraft as is made Felony by any Statute, is not puniſhable in the Eccleſiaſticall Court, but in caſe of ſlander of ſuch Witchcraft, upon ſuch ſlanderous words, of Witchcraft which is not Felony, the Eccleſiaſticall Court ſhall puniſh the ſame, and afterwards in the principall caſe, a Conſultation was awarded.

Trin. 29. *Eliz.* In the Common Pleas.

LXXV. Bardens *and* Withingtons *Caſe*.

A Is bound in a Statute to B. and ſows the Land. B. extends the Lands, which are delivered unto him in execution; it was adjudged in this Caſe, that the Conuſee ſhould have the Corn ſowed; The ſame Law in caſe of a Recognizance.

Trin. 29 *Eliz.* In the Common Pleas.

LXXVI. Smalman *and* Lanes *Caſe*.

THe Caſe was, a Capias upon an originall Proceſſe, was delivered to the new Sheriff of Warwick againſt Lane, at the ſuit of Smalman. And the Sheriff informed the Court, that before that the Proceſſe was directed to him, That the ſaid Lane was taken in Execution by the old Sheriff, upon a Judgement given againſt him in the Kings Bench; and that the ſaid old Sheriff had impriſoned the ſaid Lane, by force of the Execution in his own houſe, and there he remained, and prayed the Adviſe of the Court, what return he ſhould make upon that matter, becauſe the ſaid Lane was never in his poſſeſſion; for all the other priſoners which were in the Goal, and in the ordinary priſons, were delivered to him, and the old Sheriff would not bring Lane to the place where the other priſoners were delivered. And it was the opinion of all the Juſtices, That by the Law, the old Sheriff ought to deliver the body of him who is in his cuſtody by view, to the new Sheriff; and ſuch priſoners ought to be brought unto him to view, and from that time, the Law ſhall adjudge ſuch priſoners to be in the poſſeſſion of the new Sheriff, and not before; for he is not bound to go to them, not being in the ordinary priſon of the County. Anderſon, The new Sheriff may return, That the ſaid Lane is in Execution in cuſtodia ſua, and ſo charge himſelf; For although the Outlawrie of the old Sheriff be determined, yet it is not an eſcape, ſo long as the party be in cuſtodia, and not at large. Periam contrary, It is an eſcape in the old Sheriff aſſoon as his authority is determined, the priſoner not delivered: See now C. 3. part 71. Wesbies Caſe.

Mich. 29 *Eliz.* In the Kings Bench.

LXXVII. Megot *and* Broughton *and* Davies *Caſe*.

S. C. Cro Eliz. 105

IN an Action upon the Caſe upon Aſſumpſit, it was found by Niſi prius for the Plaintiff, and afterwards before the day in Bank, one of the Defendants died, and after Judgement given, the other Defendant brought a Writ of Error in the ſame Court, where the Judgement was given, and aſſigned an Error in fact, ſcil. the death of one of the Defendants pendant the Writ, Vide 2 A. 3. 21. It was ſaid, that the Caſe is not like the Caſe of an Action of Treſpaſſe, for every Treſpaſſe done by many, is ſeverall by each of them, but every Aſſumpſit is joynt, and not ſeverall. Another point was moved, If the Court could reverſe their own Judgement? Quære.

Trin.

Trin. 29 *Eliz.* In the Exchequer.

LXXVIII. Farrington *and* Fleetwoods *Caſe*.

THe Caſe upon the Statute of 31 H. 8. of Monaſteries, was this. The Abbot and Covent of A. &c. 29 H. 8. made a Leaſe of certain Lands for three lives, to begin after the death of one F. if they ſo long live: and afterwards, 30 H. 8. within a year before the diſſolution, they make another Leaſe to Fleetwood: If the firſt Leaſe in the life of the ſaid F. be ſuch an Eſtate and Intereſt, that by vertue of the ſaid Statute ſhall make the ſecond Leaſe voyd? was the Queſtion; for it was not in eſſe, but a future Intereſt.

Manwood, All the Reaſon that hath been made for the ſecond Leaſe, is, becauſe the firſt Leaſe is but a poſſibility; for F. by poſſibility may ſurvive all the ſaid three, and ſo it ſhall never take effect: But notwithſtanding, be it a poſſibility, or otherwiſe, it is ſuch a thing which may be granted or forfeited, and that during the life of F. And note the words of the Statute; If any Abbot, &c. within one year next before the firſt day of this preſent Parliament, hath made, or hereafter ſhall make, any Leaſe or Grant for years, life, or lives, of any Mannors, &c. whereof and in which any Eſtate or Intereſt for life or years, at the time of the making of any ſuch Leaſe or Grant, then had his being or continuance, or hereafter ſhall have his being or continuance, and then was not determined, &c. ſhall be voyd, &c. And here is an Intereſt, and that not determined at the time of the making of the Leaſe to Fleetwood. And of ſuch Opinion were all the Barons, and divers other Juſtices; and therefore a Decree was made againſt the Leaſe, &c.

Trin. 29 *Eliz.* In the Exchequer.

LXXIX. Beaumonts *Caſe*.

NOte, It was holden by all the Barons in the Exchequer, That a Duty, which is not naturally a Debt, but by circumſtances onely, as Debt upon a Bond for performance of Covenants, or to ſave harmleſs, may be aſſigned over to the Queen for a Debt; but in ſuch caſe, a preſent Extent ſhall not iſſue, but a Scire facias ſhall iſſue forth, to know if the party hath any thing to plead againſt ſuch Aſſignment.

Trin. 29 *Eliz.* In the Exchequer.

LXXX. Goddards *Caſe*.

IT was moved in the Caſe of Goddard concerning the Manor of Staple in Hampſhire, If the Tenant of the King of Lands holden in Capite be diſſeiſed, and the Diſſeiſor aliens the Lands, and afterwards the Diſſeiſee doth re-enter? Manwood ſaid, That the Land ſhall not be charged with a Fine for alienation without licenſe, becauſe the Title of the Alienee grew under the wrong of the Diſſeiſor; but the perſon of the Diſſeiſor ſhall be charged with ſuch Fine. Tenant of the King in Capite makes a Leaſe for life, the Leſſee for life makes a Freehment in Fee without licenſe, the Leſſor re-entereth, neither his perſon nor the Land ſhall be charged:

charged: but if my Feoffee upon Condition maketh a Feoffment without licenſe, and I re-enter for the Condition broken, now my Land ſhall be charged with the Fine upon Alienation, for the Feoffee was in by me by good and lawful Title, becauſe he had power to make a Feoffment over, although ſubject to the Condition. So if Tenant in tayl, or the Husband ſeiſed in the Right of his Wife, make a Feoffment in Fee, and afterwards the Land is recontinued, the Fine accruing for Alienation without licenſe ſhall binde the Land: and if Tenant for life loſeth iſſues, and dyeth, the Lands ſhall be charged with the ſame.

Trin. 29 *Eliz.* In the Exchequer.

LXXXI. *The Lord of* Northampton *and Lord* St. Johns *Caſe*.

THe Lord of Northampton had by ancient Letters Patents bona & catalla felonum & fugitivorum within the Iſle of Ely; and one dwelling within the Iſland was attainted of Felony, to whom another was indebted by Obligation, and the mony by the Condition of the Bond was to be payd at a Manor of the Lord St. Johns, who within his Manor had alſo bona & catalla felonum & fugitivorum; and at the payment the Lord St. John claimed the mony: But all the Barons of the Exchequer were clear of Opinion, That the Lord St. John could not have the mony, for the place of payment nihil operatur, but the Obligation is the ſubſtance which came to the Lord of Northampton within the Iſle of Ely. Popham, the Queens Attorny, claimed the mony for the Queen, for the Lord of Northampton cannot have it; for by the general words of bona & catalla felonum, things in Action do not paſs, but by expreſs words they well paſs, otherwiſe not: and therefore day was given to the Lord of Northampton to ſhew his Letters Patents.

Mich. 30 *Eliz. Rot.* 2737. In the Common Pleas.

LXXXII. Ards *and* Smiths *Caſe*.

EDward Ards brought a Replevin againſt Smith and Reading; the Defendants made Conuſance as Bayliffs to Robert Chamberlain, and ſhewed, That one A. was ſeiſed of the Manor of Keney in Fee, whereof the place where is parcel, and ſo ſeiſed, gave the ſaid Manor to Richard Chamberlain and Sibil Fowler, and to the Heirs males of the ſaid Richard: Richard and Sibil intermarry, and have iſſue Edward; Richard dyeth, Sibil dyeth, Edward hath iſſue Leonard, and dyeth; Leonard hath iſſue Francis, and dyeth; Francis hath iſſue Robert, in whoſe Right the Conuſance is made, and dyeth; Robert entereth: The Plaintiff in bar of the Conuſance ſheweth, That one B. was thereof ſeiſed, and thereof enfeoffed one Cottesford, then Maſter of Lincoln Colledg, and the Fellows thereof: after which the ſaid Leonard, Son and Heir male of the ſaid Edward, 25 H. 8. did releaſe to the ſaid Maſter and Fellows with warranty, the ſaid Robert, in whoſe Right the ſaid Conuſance is made, being Heir male of the ſaid Robert; and demanded Judgment, if againſt that warranty, &c. The Defendants confeſs the Gift before to the ſaid Richard and Sibil, and that they had iſſue the ſaid Edward; but further ſhewed, That after the death of the ſaid Richard, Sibil and Edward her Son leaſed the ſaid Manor for years to one Maſcal, who entered, and was poſſeſſed: Edward ſuffered a common Recovery unto the uſe of the Recoverors, who entered

and

and ouſted the Leſſee, and enfeoffed the ſaid B. who enfeoffed the ſaid Maſter and Fellows; the Leſſee re-entered, Sibil dyed, Leonard, Son and Heir apparent of Edward, releaſed to the ſaid Maſter and Fellows with warranty; Edward dyed, Leonard dyed, and thereupon a Demurrer was by the parties: And the matter was, If this Recovery being ſuffered by him in the Remainder in tayl upon an Eſtate for life, the Recoverors entering upon the Leſſee for years of the Leſſee for life, and putting him out, and afterwards the Leſſee for years re-entering; If now any Eſtate did remain in the Colledg, after that Re-entry, which might carry a Releaſe?

Snag, Serjeant, argued, That a ſufficient Eſtate did remain in the Colledg, upon which a Releaſe might enure; i. an Eſtate to begin after the death of Sibil, and the expiration of the term for years: and although rei veritate, Edward was not Tenant of the Freehold at the time of the Recovery, yet ſuch an Exception doth not lie for the Iſſue; and to that purpoſe he cited the Opinion of Fairfax, 12 E. 4. 14.

Shuttleworth, Serjeant, contrary; This Recovery works nothing but by way of Eſtoppel and Concluſion, and therefore the iſſue in tayl may well diſcloſe the matter, and avoyd ſuch Recovery: and the better Opinion of the Caſe cited before, 12 E. 4. is, That ſuch a Recovery againſt ſuch a perſon is utterly voyd, which ſee there by Littleton, Chock, and Bryan, 14 E. 4. 2. and alſo 28 Aſſ. 17. and Dyer 8 Eliz. 251, 253. Land conveyed to the Husband for life, the Remainder to the Wife in tayl, the Remainder to the right Heirs of the Husband and Wife; The Husband and Wife ſuffer a common Recovery, the Husband hath iſſue and dyeth, and afterwards the Wife dyeth, the iſſue ſhall avoyd the Leaſe and Recovery. See alſo the Caſe betwixt Hare and Snow, Plow. 20 Eliz. 514. where a common Recovery was had againſt Tenant in tayl, and his Wife, whereas in truth the Wife had nothing in the Land whereof the Recovery was ſuffered: It was holden, that the iſſue in tayl, or any other perſon, might ſhew the truth of the matter; for he ſhall not be bound by any Eſtoppel which his Father hath admitted, by joyning in Voucher with his Wife, for he is not ſubject to the Eſtoppel; and therefore it was holden, That if the Wife in ſuch caſe might ſue Execution to have in value, yet the Son in tayl might ouſt him of it. So 8 H. 4. 122. a Præcipe is brought againſt Tenant in tayl, who prays in ayd of a ſtranger as Tenant for life, who enters into the ayd, and bars the Demandant, and afterwards the Tenant in tayl dyeth; his iſſue is at large to claim the Eſtate-tayl, although the mouth of his Father was eſtopped as to it. So Tenant in tayl brought a Quod ei deforceat, and counted upon an eſpecial tayl, whereas in truth it was a general tayl, and recovereth, and dyed; the ſaid Recovery ſhall not conclude the iſſue. See 33 H. 6. 18. And in our Caſe, when the Recoverors enter by force of the Recovery, the ſame is a wrong to the Leſſee for years, and alſo to the Tenant for life; for the one is ejected, and the other diſſeiſed; and therefore the Re-entry of the Leſſee doth defeat all the Eſtate which was in the Colledg under that Recovery: and here the Entry of the Leſſee for years ſhall avoyd all the Eſtate which was conveyed to the Colledg by the Recoverors. See 44 E. 3. 30, 31. Baſſingborns Aſſiſe: Land is given to A. for life, the Remainder to B. for life, the Remainder to C. in Fee: A. alienes in Fee, the Anceſtor collateral of him who hath the Fee doth releaſe to the Alienee with warranty; B. enters, here the whole warranty is loſt, and all the firſt Eſtate is recontinued: So in our Caſe, by this Entry of the Leſſee, the whole Eſtate of the Colledg under the Recovery is defeated, ſo as nothing remains in the Colledg, upon which the Releaſe can enure, and then there is no warranty in the Caſe: And as the Caſe is here, Edward, who ſuffereth the Recovery, dyeth before the deſcent of the warranty by the death of Leonard, by whom the Releaſe with warranty was

made; by the death of which Edward the Intereſt which the Colledg had in the ſaid Mannor by the ſaid Recovery, and the Eſtoppel of it, was determined and utterly gone; and then the warranty deſcending afterwards cannot attach upon the poſſeſſion which was at the time of the warranty made, which was by the concluſion, which by the death of Edward is determined and removed by an Eign Title, i. the Entayl. As if Tenant in tayl doth diſcontinue, the Diſcontinue is diſſeiſed, Tenant in tayl releaſeth with warranty to the Diſſeiſor, the Diſſeiſee entereth in the life of Tenant in tayl, who afterwards dyeth; the warranty works nothing for the cauſe aforeſaid. And alſo he put this Caſe, Tenant in tayl of Land grants a Rent-charge in Fee, and an Anceſtor collateral releaſeth to the Grantee with warranty, and dyeth, the Tenant in tayl dyeth, now the iſſue is bound: but if Tenant in tayl dyeth before him who maketh the Releaſe, now the Rent is determined by the death of Tenant in tayl, and then the warranty cannot attach upon it. At another day the Caſe was moved, and conceived in theſe words, (ſcil.) Tenant for life, the Remainder in tayl, Tenant for life leaſeth for years, a Recovery is had againſt him in the Remainder in tayl, living Tenant for life, the Recoverors enter, and ouſt the Leſſee for years, the Son and Heir of him in the Remainder in tayl releaſeth with warranty to him to whom the Recoverors have aſſured the Lands, the Leſſee enters, he againſt whom the Recovery was had dyeth, the Releaſor dyeth, &c. It was holden, that the Entry of the Leſſee, before that the warranty had attached upon the poſſeſſion which paſsed, had avoyded the warranty. And the Lord Anderſon conceived, That the Recovery ſhould not prejudice the iſſue in tayl, but that the iſſue ſhall Fauxifie the ſame: And if Tenant in tayl be diſſeiſed, and ſo diſſeiſed ſuffereth a common Recovery, his iſſue ſhall not be barred, quod fuit conceſſum per omnes: And afterwards another matter was moved, (ſcil.) That the Releaſe is pleaded to be made to Lincoln Colledg by the name of Cuſtodi ſociis & Scholaribus Lincolnienſis Collegii in Oxonia, where the true name of the Colledg, as is confeſſed by the Record in the Plea pleaded, is, Cuſtos five Rector, Socii & Scholares Lincolnienſis Collegii in Oxonia, &c. It was adjourned. See this Caſe reported, (3 part, Lincoln Colledg Caſe.)

Mich. 32 *Eliz.* In the Common Pleas.

LXXXIII. Hall *and the Biſhop of* Bathes *Caſe.*

HAll brought a Quare Impedit againſt the Biſhop of Bath, and others; The Incumbent pleaded, Quod ipſe nihil habet, nec habere clamat, &c. niſi de præſentatione Georgii Sidenham militis, not named in the Writ, and demanded Judgment of the Writ, upon which the Plaintiff did demur in Law: And it was argued by Drew, Serjeant for the Plaintiff, That the Writ was well brought without naming the Patron: for if a Quare Impedit be brought againſt the Patron and Incumbent, and the Patron dyeth, pendant the Writ, the Writ ſhall not abate: 9 H. 6. 30. It might be, that theſe Plaintiff did not know, nor could tell, who preſented the ſaid Incumbent, but he findeth the Incumbent a Diſturber by his Incumbency: and if of neceſſity ſuch Patron ought to be named, then if ſuch a Uſurper ſhould dye before the Writ brought, then he which hath cauſe of Action ſhould be remedileſs. And by Anderſon and Periam, the Writ is good enough for the reaſon aforeſaid: And Anderſon put this caſe; If A. wrongfully by Uſurpation doth preſent, and his Clark is received; and afterwards A. having gained the Patronage, grants it over to B. Againſt whom ſhall the Quare Impedit be brought? Walmſley, Againſt B. which Anderſon doubted.

Mich.

Mich. 32 *Eliz.* In the Common Pleas.

LXXXIV. Hughes *Caſe.*

IN a Formedon, the Writ was, That A. Dedit Aliciæ filiæ ſuæ, and to J. S. and to the Heirs of their two bodies begotten, and it was ſhewed in abatement of the Writ, That the name of the wife is put before the name of the husband, To which it was ſaid by the Court, that if ſuch a Writ be brought againſt the husband and wife, and the name of the wife be put before the name of the husband, the Writ ſhall abate; And if in the caſe at Bar it had appeared, That the Donees at the time of the Gift, were husband and wife, upon ſuch a matter diſcloſed, that the Writ ſhould abate; but that doth not appear plainly to the Court.

LXXXV. *Mich.* 32 *Eliz.* In the Common Pleas.

NOte, It was holden by the Court, That if a Writ of Dower be brought againſt an Infant, who loſeth by default at the Grand Cape; that he may reverſe the ſame by a Writ of Error; but where an Infant appeareth by Guardian, and afterwards loſeth by default, there he ſhall never avoid it; for if any default be in the Guardian, the Infant ſhall recover againſt him in a Writ of Deceit. And afterwards, the Judgement in the firſt caſe was reverſed.

LXXXVI. *Mich.* 32. *Eliz.* In the Exchequer-Chamber.

NOte, In the Exchequer-Chamber, before the Lord Chancellor, The two chief Juſtices, and the chief Baron; a Writ of Error was caſt upon a Judgement given in the Court of Exchequer; and it was agreed, Quod propter abſentiam Dom. Theſaurarii Angliæ, They ought not, nor could receive the ſaid Writ; and the Statute of 31 Eliz. doth not help the matter, for that extends but to diſcontinuances, which before the Statute many times hapened for the not coming of the Chancellor or Treaſurer, and not to give Conuſance in a Writ of Error in the abſence of the Treaſurer, &c.

Mich. 32 *Eliz.* In the Common Pleas.

LXXXVII. Lacy *and* Fiſhers *Caſe.*

IN a Replevin by Lacy againſt Fiſher, The Defendant pleaded, that the place where, &c. is called Spicold, and holden of the Manor of Eaſthall by certain Rent, and made Conuſance as bailiff of the Lord of the ſaid Manor; and iſſue being joyned hereupon, It was tried by the Jury of the Viſne of Spicold, and it was moved in arreſt of Judgement, that the iſſue was miſ-tried; For the Viſne ought to have been of Spicold and Eaſthall alſo: And a Caſe was cited to have been adjudged accordingly betwixt Webb and Richmond. M. 31 Eliz. in the ſame Court. Webb and Richmonds Caſe.

Mich.

Mich. 32 *Eliz.* In the Common Pleas.

LXXXVIII. Corbets *Caſe.*

The Caſe was, That an Action of Debt was brought by originall Writ againſt an Adminiſtrator in another County then where the Adminiſtrator was dwelling, and before notice of that ſuit, he paid divers other debts of the Inteſtate, due by ſpecialties; ſo as he had not Aſſets to pay the debt in demand, having Aſſets, at the day of the Teſte of the originall, and now the Defendant appearing, pleads the ſame ſpeciall matter, and concluded, And ſo nothing remained in his hands. And it was holden per Curiam to be a good Plea: See 22 E. 4. 21. 22.

Paſc. 31 *Eliz.* In the Exchequer.

LXXXIX. Sir William Pelhams *Caſe.*

The Caſe, ſhort put, was this: A. Tenant for life of a Meſſuage, &c. the remainder in tail to B. with divers remainders over: A. by Deed Indented and Enrolled, Bargained and Sold the Meſſuage, &c. to conveyed to Sir William Pelham in Fee, who afterwards ſuffered a common Recovery thereof, in which A. is vouched; and ſo a common Recovery is had and executed, and all this was before the Statute of 14 Eliz. And if the ſaid Recovery ſhould binde B. who was in the remainder in tail; or if it be a forfeiture, was the Queſtion. Altham of Grays-Inne argued, that here is a forfeiture: Firſt, it is to ſee, if a common Recovery ſuffered by Tenant for life, (who is ſo Bargainor in this caſe) be a forfeiture or not by the common Law, if no Execution be ſued upon the ſame Recovery. Secondly, If the Recovery be executed, if he in the remainder may enter for the forfeiture. When Tenant for life bargaineth and ſelleth the Meſſuage, &c. although upon it an Eſtate in Fee be limited, yet nothing paſſeth from him, but that which he may lawfully paſs, and that was the Eſtate for the life of the Bargainor, for ſuch Eſtate only he might lawfully paſs; and here the Bargainee is but Tenant for the life of another, and when with his own conſent he ſuffers a common Recovery, and that without right, the ſame is a forfeiture. By matter in Fact, a particular Tenant may commit a forfeiture, as well as by matter of Record: By matter in Fact he cannot commit a forfeiture, if the Reverſion be not thereby pulled out of him in the Reverſion: As if Leſſee for ten years maketh a Leaſe for 1000 years, the ſame is no forfeiture, for by that the Reverſion is not touched; but if he in matter of Record do any thing which ſounds to the diſinheriſin of him in the Reverſion, although in truth it doth not touch the inheritance, yet it is a forfeiture, which ſee 39 E. 3. 15. If Tenant for life plead any thing againſt the right of him in the Reverſion, it is a forfeiture. And by Finchden and Belknap, he cannot plead to the right. 5 Aſſ. 3. Tenant for life is impleaded in a Præcipe by a Stranger, and confeſſeth the Action upon which the Demandant hath Judgement; the Leſſor enters, againſt whom the Demandant ſueth Execution, and the Leſſor brought an iſſue, and had Judgement to recover, for it is a forfeiture, becauſe the Tenant for life hath admitted the Reverſion in another, becauſe it is an alienation to the diſinheriſin of the Plaintiff, i. the Leſſor. 19 E. 3. t. Receit 14. where Tenant for life pleads in chief, or doth not gainſay the Action of the Demandant, or makes default by Covin, he ſhall forfeit his Eſtate; but if a Rent be demanded

manded against Tenant for life, and he render the same, it is no forfeiture: 32 Ass. 31. Tenant for life is impleaded by Covin betwixt him and the Demandant, and pleads in chief without aid prayer, upon which Judgement is given; he in the Reversion may enter: In a Quid juris clamat, against Tenant for life, who pleaded faulty, traversing the point of the Action, he in the Reversion shall not be received, for in as much as the Tenant hath traversed the Action; he is not within the Statute of West. 2. of default, Redition; but he in the Reversion may enter by the common Law: 22 E. 3. 2. In a Scire facias, to execute a Fine against Tenant for life, he pleaded to the Enquest, whereas in truth, the land in demand was not compriſed within the Fine, and Judgement is given for the Demandant in the Scire facias; he in the Reversion may enter: In the principall case here, there is apparent and manifest covin; for the Tenant for life is vouched without cause, and this Recovery is by assent, and is to the use of the Bargainee, who is Tenant for the life of another, and therefore by the common Law, he in the Reversion may enter before the Execution be sued. And it is well known, that these common Recoveries are used to deck a Remainder in tail; and that was the scope of this Recovery: And as to the Case of 5 E. 4. 2. Tenant for life is impleaded in a Præcipe quod reddat, who voucheth a stranger, the Demandant counterpleads the vouchee, and it is found for him; he in the Reversion hath no remedy, but by Writ of Right, and if such vouchee enters into the Warranty, and loseth by Action tried, or by default, &c. That book is to be intended of a Recovery executed; for there in such a case, he in the reversion may not enter, but is put to his Writ of Entry by the common Law, vide Br. t. Forfeit 87. 24 H. 8. Tenant for life is impleaded and prayes in aid of a stranger, he in the reversion may enter, but if he doth not enter untill the other hath recovered, then he cannot enter, but he is put to his Writ of Entry, Ad terminum qui præteriit, vel de ingress. ad com. Legem, and therein shall falsifie the Recovery. And there by Brook, Voucher of a stranger, is not a cause of forfeiture; for he doth not disaffirm the Reversion to be in the Lessor. And he vouched, 24 E. 3. 68. where Tenant for life pleaded, in the Right without aid prayer; and so he argued, That before execution, he in the Remainder might enter, but after execution, he is put to his Action; but in our case, although Execution be sued, yet he in the Remainder may enter, for it is found by Verdict, That at the time of the Recovery he was within age, and then no Lachesse of entry shall be imputed unto him, and then he shall not be driven to his Action: As if Tenant by the Curtesie maketh a Feoffment with Warranty, and dieth, and the same descendeth to his Heir within age, yet he shall enter, although that he had not avoided the Warranty in the life of his Ancestor; And he also conceived that the Statute of 32 H. 8. cap. 31. did extend to this Case: For Sir William Pelham, the Bargainee, was but Tenant for life, and although that he be but Tenant for the life of another, yet he is Tenant for life as fully, as if he were Tenant for his own life: The words of the Statute are, or otherwise for term of life or lives quo ad nom. As upon the Statute of 20 E. 1. which gives receit, i. de defensione juris; the words are, Cum quis aliquod Breve Dom. Regis impetret versus tenentem per Legem Angliæ, vel feodum talliatum, vel sub nomine Dotis, vel alio modo ad terminum vitæ, &c. Also, although that he who entreth at the time of the recovery was not next in the Remainder to the particular Estate, yet he is within the Statute of 32 H. 8. for he was in the Remainder at the time of the Recovery, and at the time of the entry, he in the immediate Remainder was dead, and then he next in Remainder: See 15 E. 4. 9. by Littleton, If I grant my services to one for life, and he in a Præcipe brought against him, plead in the Right; or granteth unto another the said services in Fee, the same is not any forfeiture, because it is not any discontinuance. It will be objected,

That the words of the Statute of 32 H. 8. are, That ſuch Recoveries ſhall be utterly void: and if ſo, then he in the Reverſion cannot be damnified, and then no cauſe of forfeiture; To that it was eaſily to be anſwered; That where Tenant for life doth any thing which ſounds to the diſinheriſon of him in the Reverſion by matter of Record, although it doth not deveſt, or otherwiſe prejudice the Inheritance, yet it is a forfeiture. Coke contrary; Here in our Caſe there is not any Covin: Sir William Pelham the Bargainee, he was deceived by the Bargainor, for he did not know, but that the Bargainor was ſeiſed in tail at the time of the Bargain, and it was lawfull for him to do any other act in the further aſſurance of his bargain; and it was lawfull for him to vouch his Bargainor; and although the Bargainor vouched a ſtranger, yet it is not a forfeiture, 39 E. 3. 16. Aid prayer of a ſtranger is a forfeiture, and the reaſon thereof is, becauſe he acknowledgeth the Reverſion to be in a ſtranger, and that is the cauſe of the forfeiture. See Book Entries 254. Where upon aid prayer, the party to have aid, ſheweth ſpeciall matter; but in our caſe, Sir William Pelham hath vouched his Bargainor, and that not without cauſe, for he hath a Warranty from him; and the Demandant could not counterplead it, for he had ſeiſin, by force whereof he might make a Feoffment: As unto the Caſe of 14 E. 3. t. Receit 135. Leſſee for life in a Præcipe againſt him without aid prayer pleaded to the Enqueſt at the firſt day, in that caſe it is ſaid, that he in the Reverſion may enter. It is true, that he may enter in the Receit, but not into the Land for forfeiture for then Fitz. would have abridged the Caſe in the Title of Entry Congeable, and not in the Title of Receit: and the Book of 5 E. 3. is good Law, for there the Tenant doth confeſſe the Reverſion to be in another; but in our Caſe the Tenant voucheth, which is a lawfull act done, and according to the Covenants of his purchaſe: And although the Recovery be by agreement, yet it is not therefore a forfeiture; for if the Tenant for life voucheth truly, it is no forfeiture. Before the Statute of Weſt 2. cap. 3. which gave Receit to the wife, and to thoſe in the Reverſion where the particular Tenant is impleaded, and maketh default, vel reddere noluerint, there was no remedy in ſuch caſes, but by Writ of Right, but no entry, and that was for the reaſon of the credit which the Law gave to Recoveries, for if they might enter, wherefore is Receit given: but that was in two caſes onely: But afterwards, becauſe it was found, that many particular Tenants being impleaded would plead faintly, the Statute of 13 R. 2. gave receit in ſuch caſes. And upon what reaſons were theſe Acts and Statutes made, if in ſuch caſes the entry was Congeable? But after theſe two Statutes, another practice was deviſed, for ſuch particular Tenants would ſuffer Recoveries ſecretly, in ſuch ſort, that thoſe in the Reverſion could not have notice thereof, ſo as they could not before Judgement pray to be received, to remedy which miſchief, the Statute of 32 H. 8. was made, by which all Recoveries had againſt Tenant by the Curteſie, or otherwiſe for life or lives, by agreement of the parties of any Lands whereof ſuch particular Tenant is ſeiſed ſhall be void, as Tenant by the Curteſie, &c. ſhould be void againſt him in the Reverſion; and yet there was an evaſion found to be out of that Statute; for ſuch particular Tenants, would make a Feoffment with Warranty, and then the Feoffee ſhould be impleaded in a Writ of Entry, and he vouch the Tenant for life who would aver, and ſuch Recovery was holden to be out of the Statute of 32 H. 8. For the Recovery was not againſt ſuch particular Tenants, &c. For the remedy of which miſchief, the Statute of 14 Eliz. was made, by which it is provided, That ſuch Recoveries had where ſuch particular Tenants are vouched ſhall be void, if ſuch Recovery be by Covin betwixt them: And he conceived, That the forfeiture is not in reſpect of the Recovery it ſelf, but of the Plea pleaded by the Tenant: And here in our Caſe, there is not any Covin

found,

found, or that Sir William Pelham knew that he was but Tenant for life; but it is found, that this Recovery was with their assent, and that was lawful as the case is; for they might agree to have such a Recovery for further assurance: and so Sir William Pelham hath not vouched any but his Bargainor, and that according to their Covenants; and this Bargainor was not a bare Tenant for life, but he had also a Remainder in tayl, although not immediately depending upon the Estate for life, which he had cut off; there it was not meerly a feigned Recovery: See 5 E. 4. 2. and 24 H. 8. br. Forfeit. 87. where Tenant for life being impleaded in a Præcipe, voucheth a stranger, the same is no Forfeiture, for the same doth not disaffirm the Reversion: but contrary of Ayd-prayer, for a stranger may release with warranty to Tenant for life, upon which he may vouch: And he reported in his Argument, That Bromley, Chancellor of England, sent him to both the chief Justices, to know their Opinions upon this point; and they were of Opinion, That the Voucher of a stranger was not any Forfeiture, and also that after the Recovery was executed, he in the remainder could not enter; but they conceived, that the Right of him in the remainder was not bound: And he said, That after the Recovery was executed, that he in the remainder could not enter: See 24 H. 8. Br. Forfeit 87. For if Entry in such Cases should be lawful, infinite Suits would follow thereupon, which would be much to the Discredit of common Recoveries, which are now the Common Assurances of the Land. As to the Objection of the Infancy, the same will not help the matter. Br. Sav. Default 50. 6 H. 8. A Recovery had against an Infant, in which he voucheth and loseth, is not erroneous; contrary of a Recovery upon a default: And if an Infant, Tenant in tayl, suffer a common Recovery; the same is a discontinuance, for in such Recoveries Infancy is not respected: And in a Scire facias upon a Judgment had against the Father, the Heir shall not have his age: And he cited a case out of Bendloes Reports, 5 Eliz. Tenant for life, the Remainder over to a Stranger in Fee, Tenant for life is disseised by Covin; in a Præcipe quod reddat against the Disseisor, he voucheth the Tenant for life, who enters into the warranty generally, and voucheth over the common Vouchee: It was adjudged, That the Recovery was out of the Statute of 32 H. 8. for the Recovery was not had against the particular Tenant, but he was but Tenant in Law, because Vouchee; and also that the Recovery was a good bar to him in the remainder, notwithstanding that he was within age at the time of the Recovery.

And afterwards at another day the Case was argued by the Barons; and Clark Baron conceived, That the Entry of him in the remainder was congeable: It hath been said, That Sir William Pelham did not know that the Bargainor had an Estate but for his life, or that any other person had any remainder therein; the same is not to any purpose to excuse him: for 42 E. 3. Every Purchasor ought at his own peril take notice of the Estates and charges which are upon the Lands of which he is Purchasor; and the Law presumes that none will purchase Lands without advice of Councel, and without knowing the Titles to the Lands. And although divers Statutes have been made to provide against the practices of particular Tenants, yet it is no argument, that no other remedy was before. And by Littleton, If Tenant for life joyneth the Mise upon the meer right, it is a forfeiture. And he held strongly, That the Judgment did not take away the Entry, cause of forfeiture being given before the Judgment: See 5 Ass. 3. and 22 Ass. 31. to that purpose: For where Tenant for life is impleaded, he ought to attend upon him in the reversion, and to expect instructions from him in defence of his Title, &c. And therefore if he maketh default, or confesseth Action, the same is a forfeiture: And as to the supposed recompence, the same shall not help this Case, for this is a common recovery, and nothing

thing elſe but an Aſſurance: And Recoverors they are but Aſſignees, and they ſhall take advantage of Conditions by 32 H. 8. and a Recoveror ſhall be ſeiſed to the uſe of him who ſuffereth the Recovery, if no other uſe be expreſſed. And he alſo held, That when Tenant for life bargains, and ſels his Lands by Deed enrolled, although no Fee paſſeth, yet it is a forfeiture, and that by reaſon of the Enrolment, which is matter of Record. And he ſaid, That if an Infant, Tenant for life, be diſſeiſed, and the Diſſeiſor dyeth, and afterwards the Infant dyeth, that he in the Remainder might enter.

Gent, Baron, argued to the ſame intent; and he ſaid, That if Tenant for life ſuffereth a Recovery, the ſame is not ſimply a Forfeiture, for he may have a warranty upon a Releaſe or Confirmation made to him. Attornment doth not give a Right, but it is onely a Conſent, yet if he who hath not any thing in the Reverſion will levy a Fine thereof unto another, and afterwards the Conuſee brings a Quid juris clamat againſt the Tenant of the Land, and he attorn, it is a Forfeiture.

Manwood, Baron, to the ſame intent; This is a new Caſe, and I have not ſeen nor read the Caſe in any Book, nor ſeen any preſidents; and it is a great caſe, and a general caſe, and worthy to be argued: And I conceive clearly, That here is a direct and expreſs forfeiture: the Dignity of Judgments in reputation of Law hath been urged, which ought to ſtand in force until they be reverſed by Error or Attaint: And alſo Littleton 481. hath been urged, where upon the Statute of Weſt. 3. he ſaith, That before the Statute aforeſaid, if a Leaſe had been made to one for life, the remainder to a ſtranger, and afterwards a ſtranger by faint Action hath recovered againſt Tenant for life by default, and afterwards the Tenant for life dyed, he in the Remainder had not any remedy: But there Littleton doth not report the ſame as his own Opinion, but as an Opinion conceived by a Reader upon the ſaid Statute; and in truth it is but a meer conceit. And as to the main point, he took this difference; Such Recoveries in which the title of the Demandant ſtands indifferent to the Court, and non conſtat, if it be good, or not, being ſuffered by Tenant for life by default or confeſſion, without ayd-prayer of him in the Reverſion, do not make any forfeiture, although that the Tenant for life hath not delt with him in the Reverſion, not having prayed in ayd of him: And in ſuch caſe, if a Leaſe be made for life, the remainder over in Fee, upon ſuch Recovery he in the remainder ſhall have a Formedon in the remainder, or a Writ of Right, and ſhall not put out him who recovered, without any Action, and that by the common Law. Then came the Statute of Weſt. 2. c. 3. which gave unto the Wife a Cui invita, upon a Recovery had againſt the Husband by default, where before ſhe had not any remedy, but onely a Writ of Right: and notwithſtanding, ſi ulterius quæratur, ulterius neceſſe habet oſtendere jus ſuum, ſecundum formam brevis quod prius impetraverat: And if his Right be not better then the right of him in the Reverſion, he ſhall loſe it, notwithſtanding the Judgment given before for him: and that Statute gave Receit, or Writ of Entry, ad terminum qui præteriit; and that Statute is to be intended of ſuch Recoveries where a good Title or indifferent is, ſo as non conſtat Curiæ, if it be good, or not? After that Tenant for life was driven unto a new ſhift, and would not make default, or loſe for not pleading, but he would plead, but that faintly; for the remedy of which miſchief, the Statute of 13 R. 2. which gave Receit in ſuch caſe; the particular Tenant being reſtrained by this Statute, he jugled yet, and practiſed to ſuffer a Recovery ſecretly, without notice of him in the Reverſion: for the remedying of which miſchief, the Statute of 32 H. 8. was made, and that makes ſuch Recovery had againſt ſuch a particular Tenant void againſt him the Reverſion.

It hath been objected, That the ſaid Statute of 32 H. 8. did not give any forfeiture in this caſe, but makes the Recovery voyd; and therefore he in the Reverſion ought to ſtay until after the death of the particular Tenant: To that I ſhall ſpeak after. But here our caſe is of a common Recovery, and it doth appear to the Court, that the Demandant hath not right, for the Tenant might have barred him: Alſo this Recovery is not to the uſe of the Recoveror, but to the uſe of him who was Tenant in it; and in truth it is nothing elſe but an aſſurance: and in theſe feigned Recoveries the Recoveror comes in under the Title of the Tenant to it, and not paramount, as in caſe of a Recovery upon a good Title. A Leaſe for years made by him who after ſuffers a Recovery is good, and ſhall not be defeated by the Recovery; otherwiſe it is where the Recovery is upon a good Title. See Statute of Gloceſt. cap. 11. where upon default of the Tenant, Receit is given for Leſſee for years; yet if the Tenant vouch, upon default of the Vouchee the Leſſee for years ſhall be received: and now Receit of Leſſee for years is out of the Book, for by the Statute of 21 H. 8. cap. 15. he may falſifie the Recovery: but no Receit lieth in the caſe of a common Recovery, for that he who recovers cannot put out the Termor. As to that which my Brother Clark hath ſaid, That the bargain and ſale in this caſe is not any forfeiture, but when the bargain and ſale is enrolled, then it is a forfeiture; I am not of ſuch Opinion: for although that the Enrolment be of Record, yet the Deed is not of Record; for againſt a Deed enrolled, a man may plead Infancy, although none can plead Non eſt factum. Alſo he held, That although by the bargain and ſale, and the Enrolment of it, the Bargainee had not a fee, for by ſuch act the Reverſion is not removed; yet by the Recovery, and the Execution of it, the Bargainee hath gained a fee out of the Leſſor, for the Recovery is to the uſe of the Bargainee, againſt whom it was had. It hath been objected, That here is onely a Voucher, which peradventure was lawful in this caſe, by reaſon of a warranty paramount, or of a Releaſe or Confirmation with warranty: and two Caſes have been vouched to that purpoſe, viz. 5 E. 4. 2. Tenant for life being impleaded in a Præcipe, voucheth a ſtranger, the Demandant counterpleads the Voucher, which is found for him, he in the Reverſion hath no remedy but a Writ of Right; ſo if the Vouchee had entered into the warranty, and loſt, &c. As to that booke, we ought not to conceive, That every Caſe reported in our books is Law; but let us obſerve, of what authority that caſe is; truly it is the conceit of the Reporter himſelf, for he puts the caſe, and reſolves the caſe, but no Judg or Serjeant is named in the caſe, &c. The other caſe is 5 E. 4. 2. b. Note by Heydon clearly, If my Tenant for life voucheth a ſtranger, who entereth into the warranty generally, and doth not know how to bar the Demandant, the Tenant ſhall recover in value, and the Reverſion of that which he hath in value ſhall be in me in lieu of my former Reverſion; as a Releaſe to the Tenant for term of life ſhall enure to him in the Reverſion: But that is but the Opinion of one Serjeant, &c. But I anſwer to theſe books, If the Demandant in ſuch Recovery hath a good Title, ſo as the Tenant or the Vouchee, as Heydon ſaith, do not know how to bar the Demandant, there ſuch Voucher of a ſtranger is no forfeiture, nor ſuch Recovery ſuffered upon it, for againſt his Will, volens nolens, he ſuffered it: but if the Tenant hath good matter to bar the Demandant, and no good cauſe of Voucher, nor any warranty, as the matter is in the caſe of a common Recovery, there the Voucher of a ſtranger, or ſuffering of a Recovery, is a forfeiture of his Eſtate. And here in our caſe the Demandant hath not any Title, the Tenant or Vouchee hath not any warranty; but the Tenant might have barred the Demandant if he would: And he ſaid, That the Voucher onely doth not make the forfeiture, but rather the recovery; for when Judgment

is given, and Execution is had, then the Fee is plucked out of the Reverſioner: vide 6 R. 2. If Tenant for life claimeth a Fee, the ſame is a forfeiture: but here Sir William Pelham hath done more, for he hath gained Fee by the Judgment, therefore a fortiori it ſhall be a forfeiture. But let us ſee a little what meddlings or attempts by the particular Tenants are cauſes of forfeiture, and what not: 5 Aſſiſ. 3. A. brought a Writ of Entry againſt Tenant for life by Colluſion to ouſt B. of his Reverſion, ſuppoſing that the Tenant for life held of his Leaſe; the Tenant confeſſed the Action, upon which Judgment is given; B. enters, and his Entry adjudged lawful, for this Recovery is adjudged in Law but an alienation to the diſinheriſin of him in the Reverſion: and there it appeareth, that ſuch Recovery by Covin is but an alienation, and without any ſtrength of a Recovery. And he cited many other caſes cited before by Altham: 14 E. 3. Receit 135. where Tenant for life pleads in chief, and prays in aid of a ſtranger, where he might bar the Demandant, and would not, the ſame is a forfeiture: Alſo 22 E. 3. 2. and 27 E. 3. where Tenant for life, in a Quid juris clamat, attorned to the Conuſee upon a Fine levyed by him that had not any thing in the Land, the ſame was a forfeiture; and yet the Attornment doth not deveſt the Reverſion out of the Lord: 50 E. 3. 7, and 8. Land was given by Fine in tayl, the remainder over to a ſtranger in fee, the Donee took a Wife and dyed without iſſue, the Wife accepted Dower aſſigned by a ſtranger, he in the remainder brought a Scire facias againſt the Wife; ſhe is Tenant in Dower of the aſſignment of a ſtranger, and pleads to the Title; the Demandant recovereth, ſhe hath loſt her Dower, for ſhe hath not pleaded dutifully as ſhe ought, being a particular Tenant, &c. H. 4. Tenant for life loſeth his Land in a Recovery againſt him againſt his Will, and thereupon brings Quod ei deforceat, and declares upon an Eſtate tayl, and recovers, the ſame is a forfeiture, becauſe he hath challenged a higher Eſtate then he had: 5 H. 5. Tenant for life joyns the Wiſe upon the meer right: 2 H. 6. Leſſee for years being ouſted, brings an Aſſiſe, and recovers: 1 H. 7. Accepts a Fine of a ſtranger upon condition come ceo, &c. all theſe are forfeitures. In the principal Caſe here, the Tenant who ſuffers his Recovery doth not plead at all to defend the Right: but whereas he might have barred the Demandant, he giveth ſtrength to his pretended Title, and makes it a perfect Title; and by ſuffering this Recovery and Judgment to paſs upon it, he hath taken the Reverſion out of the Lord to whom he owed Fealty, and therefore he ſhall forfeit his Eſtate. And without any doubt it is apparent to the Court, that the Demandant in this Recovery hath not any Title, but the Recoverors in ſuch caſes are but as Aſſignees or Purchaſors, which appears by the Statute of 7 H. 8. ca. 2. which gives Diſtreſs and Avowry to Recoverors, &c. As to the inventing of Recoveries, it was a neceſſary deviſe, for it was to take away Eſtate tayls, which were the cauſes of great miſchiefs and inconveniencies in this Realm: and there was great reaſon for it; for Tenant in tayl might by the common Law alien his Lands poſt prolem ſuſcitatam, and now he hath an Inheritance, and may do Waſte: But he was ſo reſtrained by the Statute of Weſt. 2. that all the Realm, and the Subjects in it, were inveigled thereby; Joyntures of Wives, Leaſes of Fermors, Mortgages to Creditors, Statutes, and other Aſſurances, were defeated by the deaths of Tenants in tayl, which was both againſt the common Law, and alſo againſt all Conſcience. Theſe matters coming to the knowledg of the Juſtices, and the miſchiefs thereupon following being very frequent, and it appearing that Tenant in tayl was a dangerous fellow, and that there was no ſafe dealing with him, they took conſideration of them: and conſidering alſo with themſelves, That Lineal Warranty and Aſſets, and Collateral Warranty without Aſſets, did bar the Entayl, upon this conſideration

they

they grounded the practice and uſage of common Recoveries, So as by that means Tenant in tail, hath Poteſtatem alienandi, as he hath at the common Law; and by this means, right was done to the common Law becauſe its authority was reſtored; and thereby injury was done to no man: But as for Tenant for life, he never had Poteſtatem alienandi. And as to that which hath been ſaid, That the Recovery ſhall ſtand in force untill after the death of Tenant for life; and in our Caſe here, Tenant in tail is alive; Truly, if the Law ſhould be ſuch, great miſchiefs would follow: For then great Joyntreſſes, The widows of great perſons, having aſſurances to them of great and ſtately Houſes, and of Lands, furniſhed with Timber, of great yearly value, might ſuffer ſuch Recoveries; and ſo having plucked the Fee out of the Heirs, might commit waſte, and the ſame ſhould be diſpuniſhable, which would be an intollerable miſchief; and ſo he concluded, that the ſuffering of a Recovery was a forfeiture, and Judgement, Trin. 21 Eliz. was given, and entred accordingly.

Trin. 31 *Eliz.* In the Exchequer.

XC. Noones *Caſe.*

DEbt was brought in London, againſt one as Executor, and upon fully adminiſtred pleaded, it was found for the Plaintiff, who aſſigned the ſame to the Queen, whereupon a Scire facias iſſued out of the Exchequer againſt the Defendant, into the County of Dorſet. The Sheriff returned Nulla bona, &c. which Scire facias was upon a Conſtat of goods in another County; It was agreed by all the Barons, that the Debt was well aſſigned to the Queen: And alſo that the Scire facias might iſſue forth of another Court, then where the Record of the Judgement remained; and that upon a Conſtat of goods, in another County then where the Writ is brought, or where the party is dwelling, he may well have a Scire facias in another County. But the Return was challenged, becauſe contrary to the Verdict: As in a Replevin, No ſuch beaſt, is not a good Return, but Averia elongata; or Nullus venit ex parte querentis ad monſtrand. averia: And here the Sheriff might have returned, Devaſtavit which well ſtands with the Verdict, 5 H. 7. 27. But as to that, It was ſaid by the Barons, That it is true, that the Sheriff of the County where the Writ was brought, is concluded by the Verdict, to make any return contrary to it; but the Sheriff of another County ſhall not ſo be; but the Sheriff of the County where the Writ is brought ought to return Devaſtavit, &c. and thereupon the Plaintiff ſhall have proces into another County; But the Queſtion further was: If a Scire facias upon Teſtatum ſhall iſſue into another County, before that the Sheriff of the County where the Writ is brought, had returned a Devaſtavit? for ſome conceived, That a Devaſtavit where the Writ was brought, ought firſt to be re-returned, and then upon a Teſtatum, Proces ſhould iſſue forth into any County within England; But others were of opinion, That without a Devaſtavit returned upon a Teſtatum, Proces might be ſued forth immediately into any other County. Williams ſaid, If I recover goods by Action brought in Midd. I may upon a Teſtatum, have a Capias into any foreign County.

Trin.

Trin. 31 *Eliz.* In the Exchequer.

XCI. Weſtern *and* Weilds *Caſe.*

IN a Writ of Accompt brought in London, the Defendant pleaded, Never his Receiver, &c. which was found for the Plaintiff, and Judgement given, that the Defendant ſhould accompt; Afterwards the Defendant brought in his Writ of Priviledge; and if the ſame ſhould be allowed after Judgement? was the Queſtion: Coke, It ſhall be allowed, for the Defendant hath not ſurceaſed his time. This Judgement to accompt is not properly a Judgement, for no Writ of Error lieth upon it before the accompt be ended: Manwood, Regularly, after Judgment, No priviledge ſhall be allowed, but that is to be intended of a Judgment ended; but here notwithſtanding this Judgment, the Action is depending, and therefore he conceived that the priviledge ſhould be allowed in this caſe. It was objected, That then the Plaintiff ſhould be at great miſchief, for he ſhould loſe the advantage of his triall; for he muſt begin again, and plead again, and have a new Triall. Clark, the Plaintiff ſhall have benefit of his former trial by way of Evidence.

Trin. 27 *Eliz.* In the Common Pleas. *Rot.* 1353.

J. C. 3 Leon. 115.

XCII. Brian *and* Cawſens *Caſe.*

IN an Action of Treſpaſſe by Brian and his wife, and others, againſt Cawſen; That William Gardiner was ſeiſed in Fee, according to the cuſtome of the Manner of C. of certain Lands, and ſurrendred them to the uſe of his laſt Will; by which he deviſed them in this manner; i. I bequeath to John Th. my houſe and land in M. called Larks and Sone: To Steph. Th. my houſe and land, called Stokes and Newmans, and to Roger Th. my houſe and lands, called Lakins and Brox. Moreover, If the ſaid John, Stephen, or Roger, live till they be of lawfull age, and have iſſue of their bodies, lawfully begotten, then I give the ſaid lands and houſes to them and their heirs in manner aforeſaid, to give and ſell at their pleaſure; but if it fortune one of them to die without iſſue of his body, lawfully begotten, Then I will that the other brothers, or brother, have all the ſaid houſes and lands in manner aforeſaid: and if it fortune the three to die without iſſue, in like manner, Then I will, that all the ſaid houſes and lands be ſold by my Executor or his aſſignes, and the money to be given to the poor: The Deviſor dieth; John, Sephen and Roger are admitted according to the intent of the Will, Roger dieth within age, without iſſue, John and Stephen are admitted to his part, John comes of full age, and hath iſſue, J. and ſurrenders all his part of the whole, and his Eſtate therein, to the uſe of Stephen and his heirs, who is admitted accordingly; Stephen comes of full age, John the father dieth, Stephen dieth without iſſue, John the ſon, as coſin and heir of Stephen is admitted, according to the Will, and afterwards dieth without iſſue. The wives of the Plaintiffs are heirs to him, and are admitted to the ſaid lands, called Larks and Sone, and to the moytie of the lands, called Lakins and Brox, parcell of the lands where, &c. by force whereof they enter into all the lands where the Treſpaſſe is done, and it was found, That A. ſole Executor, died Inteſtate, and that Cawſen the Defendant is Coſin and Heir of the Deviſor, and that he as Heir, entred, and did the Treſpaſſe. Firſt, it was agreed by all, That by the firſt words of the Will, the three Deviſees had but for their lives. But Fenner and Walmeſley, who argued for the Plaintiffs

Plaintiffs conceived, that by force of the latter words (ſcil.) If the ſaid John, Stephen, and Roger, live till they be of lawfull age, and have iſſue of their body, lawfully begotten, Then I give the ſaid Lands and Houſes to them and their Heirs, in manner aforeſaid, &c. that they have Fee; and the words, (in manner aforeſaid) are to be referred, not to the Eſtate which was given by the firſt words, which was but for life, but to make them to hold in ſeverality, as the firſt Deviſe would, and not jointly, as the words of the ſecond Deviſe do purport: And Fenner ſaid, It had been reſolved by good opinion; That where a Fine was levied to the uſe of the Conuſee and his wife, and of the heirs of the body of the Conuſor, with divers Remainders over, Proviſo, That it ſhould be lawfull to the ſurvivor of them, to make Leaſes of the ſaid Lands in ſuch manner as Tenant in tail might make by the Statute of 32 H. 8. Although thoſe Lands were never deviſed before the Fine, yet the wife ſurvivor, might demiſe them by force of the Proviſo, notwithſtanding the words in manner, &c. So if Lands be given to A. for life, upon condition, the remainder to B. in manner aforeſaid; theſe words, in manner aforeſaid, ſhall referre unto the Eſtate for life limited to A. and not to the Condition, nor to any other Collaterall manner. The words, If they live untill they be of full age, and have iſſue, are words of Condition, and ſhall not be conſtrued to ſuch purpoſe, to give to them by implication an Eſtate tail; for the words ſubſequent, are, That they ſhall have to them and their Heirs, to give and ſell at their pleaſures, by which it appeareth, that his intent was not to make an Eſtate tail; for Tenant in tail cannot alien or diſpoſe of his Eſtate, &c. And as to the latter words, And if it fortune they three to die without iſſue, &c. theſe words cannot make an Eſtate tail, and the expreſſe limitation of Fee in the former part of the Will, ſhall not be controled by implication, out of the ſubſequent words: As if Leſſee for fourty years deviſeth his term to his wife for twenty years, and if ſhe die, the remainder of the term to another, although ſhe ſurvive the twenty years, ſhe ſhall not hold over. And here, the ſecond ſale, appointed to be made by the Executor, ſhall not take away the power of the firſt ſale allowed unto the Deviſees after iſſue. Snagg and Shuttleworth, Serjeants, to the contrary: And they ſaid, that the Defendant hath right to two parts, for no Inheritance veſteth in the Deviſees untill full age and iſſue; and becauſe two of the Deviſees died without iſſue, they never had an Inheritance in their two parts, and ſo thoſe two parts do deſcend to the Defendant, as heir to the Deviſor, no ſale being made by the Executor; Theſe words, If John, Stephen and Roger, are to be taken Diſtributive, viz. If John live, &c. are to be taken Diſtributive (ſcil.) If John live untill, &c. he ſhall have Inheritance in his part, Et ſic de reliquis: As if I have right unto Lands which A. B. and C. hold in common, and I by Deed releaſe unto them all, the ſame ſhall enure to them ſeverally, 19 H. 6. And here, theſe latter words, If they three die without iſſue, It ſeems to be but an Eſtate tail: See to that purpoſe, 35 Aſſ. 14. 37 Aſſ. 15. For a man cannot declare his intent at once, but in ſeverall parts; all which make but one Inheritance, and ſo it is ſaid by Perſay, 37 Aſſ. 15. we ought to adjudge upon all the Deed, and not upon parcell. And ſee Clatches Caſe, 16 Eliz. Dyer 330, 331. And it was ſaid, That if I give Lands to one and his heirs, as long as J. S. hath heirs of his body, the ſame is a Fee-ſimple determinable, and not an Eſtate tail, Quære of that. Then here the Fee-ſimple is determined by the death of the Deviſees without iſſue, and therefore the Lands ſhall revert to the Heir of the Deviſor, eſpecially there being no perſon in rerum natura, who may ſell, for the Executor before any ſale by him made, died Inteſtate; and if he had made Executors, yet the Executor of the Executor could not ſell, which ſee, 19 H. 8. 9. 10. And afterwards, the Juſtices reſolved, That no Eſtate tail is created by the Will, but that the Fee-ſimple is ſetled

in them when they came to their lawful age, and have iſſue; ſo as the reſidue of the Deviſe is voyd: And Judgment was given for the Plaintiffs.

XCIII. *Hil.* 29 *Eliz.* In the Common Pleas.

THe Caſe was this, (viz.) By the Civil Law the Parſon ought to have his Tythe by the tenth Ridg: And in a great Field there was Corn upon the Arable Land, and Graſs upon the Head lands; and in a Suit for Tythe Hay, and Rakings of the Corn, the Defendant did preſcribe, To pay the tenth Shock of Corn for all the Corn, Hay, and Rakings of the Corn; and the Preſcription was challenged not to be good, for it is upon the matter a Preſcription of Non Decimando, for the tenth Shock is due of common Right, and ſo nothing is for the Hay and Rakings: It was holden by all the Juſtices, That for tying of Horſes upon the Head lands, and eating of the Graſs and Corn together, that the Preſcription was good: But the doubt was, when the Graſs is made into Hay, which is upon the Head lands, If it be a good Preſcription then, and diſcharge for the Hay, becauſe it is another thing then what is growing upon the Land? But in the end all the Juſtices agreed, That by the Civil Law (ut ſupra) the tenth Ridg is due for Tythe Corn; therefore for the reaping, binding, and ſhocking, it is a reaſonable Preſcription, that the party ſhall have the Hay upon the Head lands in recompence of the ſaid other things, and the Hay upon the Head lands is but of little value.

See ante 1. 99.

XCIV. 29 *Eliz.* Challoner *and* Bowyers *Caſe.*

IN Aſſiſe of Novel Diſſeiſin by Challoner againſt Bowyer, it was given in Evidence at the Aſſiſe, That William Bowyer was ſeiſed, and having iſſue two Sons, and two Daughters, deviſed his Lands to his younger Son in tayl, and for want of ſuch iſſue, to the Heirs of the body of his eldeſt Son; and if he dye without iſſue, that then the Land ſhall remain to his two Daughters in Fee: William Bowyer dyeth, the younger Son dyeth without iſſue, living the eldeſt Son, having iſſue him who is Tenant in the Aſſiſe: It was moved, That notwithſtanding that by way of Grant, the Son, living his Father, cannot take as Heir, i. by limitation, as Heir to his Father, becauſe that none can be ſaid or held Heir to his Father as long as the Father be alive; yet by way of Deviſe the Law ſhall favor the intention of the party, and the intent of the Deviſor ſhall prevail. But all the Court was ſtrongly againſt it, and held, that as well in Caſe of Deviſe, as of Grant, all is one. Whereupon the Tenant produced witneſſes, who affirmed upon their Oaths, That the Deviſor declared his meaning concerning the ſaid Will, That as long as his eldeſt Son had iſſue of his body, that the Daughters ſhould not have the Land: but the Court utterly rejected the matter; and Judgment was given for the Plaintiff.

Ho 6. 30.

Dyer 99.

29 *Eliz.* In the Exchequer.

XCV. *The Counteſs of* Linnox *Caſe.*

IN this Caſe it was ſaid by Manwood chief Baron, That whereas the Ciſtercians, &c. had a Priviledg, that they ſhould not pay Tythes for their Lands, quas propriis manibus excolant, but their Fermors ſhould pay Tythes: and now by the Statute of 31 H. 8. they are diſſolved, That the Queen and her Fermors ſhould be diſcharged of ſuch Tythes as the ſpiritual perſons were; for the Queen cannot excolere; ergo, her Fermors ſhall be diſcharged: and ſo long as the Queen hath the Freehold, her Fermors ſhall have ſuch Priviledg, although ſhe Leaſeth for years, or at Will: But if the Queen granteth over the Reverſion, then the Fermors ſhall pay Tythes.

Mich. 29 *Eliz.* In the Kings Bench.

XCVI. Goldings *Caſe.*

IN an Action upon the Caſe againſt Golding, the Caſe was; A Feme ſole, being Tenant for life by Deviſe of Lands, Leaſed the ſame for years, to begin after her death; and afterwards made another Leaſe, 18 Octob. for twenty one years to the ſame Leſſee, to begin at Michaelmas before; and the Pleading was, Virtute cujus quidem dimiſſionis: and the Leſſee entered Craſt. Sanct. Mich. which was before the making of the Leaſe: And upon the Grant of theſe two Leaſes, the conſideration of Aſſumpſit was grounded in an Action of the Caſe thereupon, and ſix hundred pounds damages given: And now this was moved in Arreſt of Judgment.

Coke for the Plaintiff; Where two Conſiderations are layd down in the Declaration, although that the one be voyd, yet if the other be ſufficient, the Action upon Aſſumpſit lieth, and damages ſhall be taken accordingly. And the Grant upon the Aſſumpſit was, That both the Leaſes ſhould be aſſigned to the Defendant; and the Plaintiff hath declared accordingly, although that one of the Leaſes be voyd: And the Agreement was, That the Plaintiff ſhould aſſign totum ſtatum, titulum, & intereſſe ſuum quæ habet in, &c. It appears here in the Pleading, That the Leaſe was made the eighteenth of October, and the Leſſee did enter, and was thereof poſſeſſed, Craſt. Mich. which was before, and ſo the Leſſee then entering was a Diſſeiſor: But by Coke, the ſame is not a Diſſeiſin, although that the Leſſee entereth before the Leaſe made; for there was a communication of a Leaſe, although the Leaſe was not made before the eighteenth of October; and peradventure it was by aſſent of the Leſſor, in which caſe it cannot be a Diſſeiſin: but be it a Diſſeiſin, yet in as much as he hath aſſigned all his intereſt, quod ipſe tunc habuit, the Conſideration is anſwered; and he hath alſo delivered both the Indentures of Demiſe, and hath granted all that which he might grant, be ſuch Grant voyd or good, it is a good Conſideration enough as to us.

Egerton, Sollicitor, contrary; In every Action upon the Caſe upon a Promiſe, there are three things conſiderable, Conſideration, Promiſe, and Breach of Promiſe: As unto the Conſideration in our Caſe, the Grant of the Leaſe, which is to begin after the death of the Leſſor, is meerly voyd: and as to the ſecond Conſideration, it appeareth, That the Leſſor at the

time

time of the making of the Leaſe had but a Right, for he was diſſeiſed; for he who was afterwards the Leſſee entered before he had any Leaſe made unto him; and ſo here is not any conſideration to ground the Aſſumpſit upon: But admit that there be a conſideration, yet the Action doth not lie: For 19 Eliz. a difference was taken by the Juſtices, (ſcil.) When in the Declaration in an Action upon the Caſe, two or more conſiderations are layd, and are not collateral, but purſuant: As if I ow you an hundred pounds, and I ſay, That in conſideration that I ow you 100 l. and in conſideration that you ſhall give me 10 l. I promiſe to pay unto you the ſaid hundred pounds which I ow you: If you bring an Action upon the Caſe againſt me for the hundred pounds, and lay in your Declaration both conſiderations, although you do not pay me the ten pounds, yet the Action lieth: But where the conſiderations are not purſuant, but meerly collateral, and do not depend the one upon the other, As in conſideration that you are of my Councel, and you ſhall ride with me to York, I promiſe to give to you an hundred pounds; there both conſiderations ought to be proffered, or otherwiſe the Action doth not lie: and ſo here in the principal Caſe, the conſiderations being collateral, they both ought to be performed. Afterwards, upon conſideration had of the Caſe by the Court, Judgment was given for the Plaintiff: and it was ſaid by Coke, That there was not any Diſſeiſin in the Caſe, but he who entered was Tenant at ſufferance, by reaſon of the precedent communication.

Trin. 28 *Eliz.* In the Kings Bench.

XCVII. Curtiſe *and* Cottels *Caſe.*

THe Caſe was this, That one Bonham was ſeiſed of a Manor, within which there were divers Cuſtomary Lands demiſable by Copy for three lives: The Lord of the Manor did demiſe ſome of thoſe Lands to three Siſters, Habendum to them for their lives ſucceſſive, for the Fine of 100 l. by them payd; and they being ſeiſed accordingly, the eldeſt Siſter, who was Tenant in poſſeſſion, took to Husband one Chapman; after which the ſaid Lord by Indenture Leaſed the ſame Land to the eldeſt Siſter, the Remainder to the Husband, the Remainder to the ſecond Siſter, and no Agreement was made thereunto by the ſecond Siſter by Deed, before or after the making of the ſaid Indenture; but four days after the Leaſe made ſhe agreed to it in the Country, and then took to Husband Curtiſe, and they entered, claiming the ſaid Land, upon which Entry the Action was brought: The point was, That when the Leaſe by Indenture was made to the eldeſt Siſter, at which time no agreement was made by the ſecond Siſter who was in Remainder; yet when after ſhe agreed, If by that Agreement her Right to the Copyhold were extinct, or not? ſo as the intereſt of the eldeſt Siſter being gone by the acceptance of the Eſtate by the Indenture, the ſecond Siſter might come and claim her cuſtomary intereſt, as it were paramount the intereſt of the eldeſt Siſter, which ſhe claimed by the Indenture.

Glanvil, The cuſtomary intereſt of the eldeſt Siſter is extinct upon this matter, by reaſon of her agreement to it afterwards. Where an Eſtate is given to one by a lawful act, it ſhall be adjudged in the party before agreement, until it be diſagreed unto; and if the party do once agree, he cannot afterwards diſagree unto it. If an Eſtate be lawfully made to a Copyholder but for years, his whole intereſt in the Copyhold is determined: and that a Freehold cannot be waived in pais, but onely by matter

matter of Record: See 13 R. 2 Joynt-tenants 13. A Charter of Feoffment was made to four, and Seiſin was delivered to three of them in the name of them all; and afterwards the fourth Feoffee came and ſaw the Deed, and ſaid, That ſhe would not have any thing in the Lands, but altogether diſagree unto it; and it was, that that diſagreement by word in pais did not deveſt the Freehold out of her: But when the party doth diſagree in a Court of Record, there the Freehold is out of the party ab initio; and if he once agree, he ſhall not diſagree afterwards. See Littl. Sect. 648. Tenant in tayl enfeoffeth his Son and Heir apparent, and another, and Livery and Seiſin is made to the other, according to the Charter of Feoffment, in the name of the Son alſo, the Son not knowing of it, nor diſagreeing to the Feoffment; the other Feoffee dyeth, the Son neither occupies the Lands nor takes the profits of them during the life of his Father; the Father dyeth, the ſame is a Remitter to the Son, becauſe the Freehold is caſt upon him, and there is no default in him, and therefore he is remitted: But upon an illegal act it is otherwiſe; For if A. diſſeiſe B. to the uſe of C. in ſuch caſe nothing is in C. before an expreſs Agreement, for the Diſſeiſin was an unlawful act. And in this Caſe at Bar, it doth not appear that the eldeſt Siſter is dead, and therefore the Right of the ſecond Siſter cannot now come in queſtion.

Shute, Juſtice, If the ſecond Siſter, at the time of the making of the ſaid Indenture, had agreed unto it, then it had been a full extinguiſhment, but by an agreement afterwards it is not good.

Gawdy, Juſtice, The Remainder is in conſideration of the Law; and the Eſtate of the firſt Siſter is not ſo determined, that any can take advantage of it; for the Lord, againſt his Leaſe by Deed indented, cannot enter, or claim any thing: and the ſecond Siſter, although ſhe hath not agreed, ſhe cannot enter during the life of her elder Siſter, for her Remainder takes effect in poſſeſſion after the death of her ſaid Siſter. But if any ſhould take advantage of it, it ſhould be the Lord, if his Deed indented did not ſtand againſt him. And afterwards Judgment was given againſt the younger Siſter.

Clench, Juſtice, was of another Opinion, viz. That the Entry of the younger Siſter, notwithſtanding that her elder Siſter was alive, was lawful: Quære of that.

Trin. 28 *Eliz.* In the Kings Bench.

XCVIII. Wellocks *Caſe.*

A Parſon, in conſideration of twelve pence, granted to one of his Pariſhioners, That he ſhould hold his Lands diſcharged of Tythes: It was holden by the whole Court, That the ſame was no good Diſcharge, being without Deed, as a Leaſe of his Tythes. But it was holden, If the Parſon afterwards ſueth the Pariſhioner for Tythes againſt the ſaid Grant and Promiſe, the Pariſhioner may have an Action upon the Caſe againſt the Parſon upon his Promiſe, although he cannot plead the Grant as a Leaſe.

Trin. 28 *Eliz.* In the Common Pleas.

XCVIII. Lawſon *and* Hares *Caſe.*

A Replevin by Lawſon againſt Hare, who avowed for a Leet Fee; and ſhewed how that he, and all thoſe whoſe Eſtate he hath in the Hundred of C. have uſed to hold a Leet, once every year; and that at each time, when ſuch Leet hath been holden, the Inhabitants within the ſaid Leet have uſed to pay to the Lord of the Leet 16 d. for a Leet Fee; and that the Lords of the ſaid Leet have uſed to diſtrain for the ſame: and ſhewed further, that 5 Julii 26 Eliz. he held there a Leet, &c. The Plaintiff replied, Abſque hoc, that they had uſed to diſtrain; and iſſue being joyned, it was found for the Defendant. It was moved in Arreſt of Judgement, becauſe, that the Defendant had entitled himſelf to a Leet, by an Eſtate in the Hundred, and did not ſhew a Deed of it, which was ſaid, he ought to have done; as is 11 H. 4. 48. And of ſuch opinion was Anderſon and Windham, Juſtices. Periam and Rhodes Juſtices, contrary, as this caſe is, and that the Avowant need not ſhew a Deed; But if the hundred it ſelf had been in queſtion, then a Deed ought to have been ſhewed; But here the Avowant entitles himſelf to one thing, (ſcil.) a Leet, and a Leet Fee, by reaſon of a Hundred, and it is ſufficient for him to ſay, That he is ſeiſed of the Hundred, &c. although it be by diſſeiſin: for if he hath poſſeſſion of the Hundred, be it jure, vel injuria, he ſhall have alſo all things incident thereunto, for the poſſeſſion of the Hundred draws to him the Leet, and the Leet, the Leet Fee. But admit in this caſe a Deed ought to be ſhewed, we are to ſee if the ſame be helped by the Statute of Jeofailes, which extends to defaults in form in Writs, Originall or Judiciall Counts, Declarations, Plaints, Bills, &c. 18 Eliz. cap. 14. and ſuch defects are thereby helped. And by Anderſon, although that the Avowant be Quaſi an actor, yet in Rei veritate, he is Defendant: For although that he is to have return of the Cattell, if it be found for him, yet he who ſueth the Replevin is the Plaintiff, and if the Defendant will juſtifie the diſtreſſe, and not avow, he is meerly Defendant, and not a Plaintiff, or Actor, no more then in a Præcipe quod reddat, The Tenant voucheth and recovereth in value, he cannot be ſaid Plaintiff, or Demandant, and the Avowant cannot be Nonſuit, as the Plaintiff. But Windham and Periam were of a contrary opinion: For Avowrie is in lieu of a Declaration, and the Plea of the Plaintiff to the Avowrie, is not called a Replication, but a Bar to the Avowrie. But admit the Avowrie be within the Statute, then if the Statute of Jeofailes there extend to help it: And Anderſon conceived that it did: But the Plaintiff might have demurred upon the Avowrie for the not ſhewing of the Deed, and Judgement ſhould have been given for him; but when he hath traverſed, and the iſſue found againſt him, now it ſhall be intended, that the Avowant hath a Deed, although he hath not ſhewed the ſame. Another Exception was taken, becauſe it is laid in the Avowrie, That the ſaid Leet was holden, 5 Julii, and then it was void: For the Statute of Magna Charta, cap. 35. requires, that Leets be holden within one Month after Michaelmas and Eaſter; But that Exception was not allowed: For by Anderſon, Windham and Rhodes, by force of the Preſcription, The Lord might hold his Leet what day he pleaſed, and that his Liberty is not reſtrained by the Statute; and ſuch is the common experience: For the ſame Statute provides for it, (ſcil.) Quod quilibet habeat libertates ſuas quas habuit, & habere conſuevit tempore Regis H. avi noſtri, vel quas poſtea perquiſiret: And by Rhodes, the ſaid Statute doth not extend but to the Sheriffs Towns, and not to other Leets, which ſee Br. Leets, 23

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upon the Caſe of 8 H.7.1. which was affirmed by him to be good Law; Contrary by Perſam, but he granted, that if a Leet hath uſed to be holden at one day certain, other then that which is limited by the ſaid Statute, the ſame may ſo continue, notwithſtanding the Statute, for ſuch Liberty is ſaved by the Statute. And by Anderſon and Rhodes; If the King grant to one a Leet to hold Semel quolibet anno, and doth not ſay, Ad libitum of the Grantee, yet the Grant is good, and the Grantee may hold it at what day he will.

13 *Eliz.* In the Exchequer-Chamber, *Error.*

C. Goore *and others againſt* Dawbeny.

A Writ of Error was brought in the Exchequer-Chamber by Goore and Goore, Swinnerton and Tedcaſtel, againſt Dawbeny, of a Judgement given againſt them in the Court of Exchequer, in an Action upon the Caſe, in the nature of a Conſpiracy brought by Dawbeny, &c. who declared, That Goore and Goore, were joynt Merchants of a ſtock of many wares, in moyeties tranſported in Barbary, and Swinnerton and Tedcaſtel were their Factors, and Dawbeny and the Goors were alſo joynt Merchants intire of Merchandizes tranſported &c. And the ſaid Swinnerton and Tedcaſtel were their Factors therein; and that was to Merchandize for two years; and ſhewed further, That the ſaid Plaintiffs did conſpire againſt the ſaid Dawbeny (See the Declaration in the Number Roll, for I could not take it in brief.) Coke of Councill with the Plaintiff aſſigned the Errors; becauſe Dawbeny in his Declaration hath declared, that they were joynt Merchants (ſcil.) the now Plaintiffs, and have conſpired againſt him, and hath not ſhewed the place where they were joynt Merchants, or where they were made joynt Merchants, and that is iſſuable, although it be not the principall thing in the Declaration; for that is the fraud: As where Debt is brought for Rent reſerved upon a Leaſe for years, the principall matter is the Debt, and the principall Iſſue is Nihil debet; yet the Demiſe is iſſuable, and Non dimiſit is a good Plea: And here the Defendant by the Plea of Not guilty, hath not loſt the advantage of Exception aforeſaid. And he cited a great Caſe lately adjudged betwixt Stanſam and Matchew, in an Action upon the Caſe, conceived upon the Trover of a Bond and the Converſion of it to his uſe; The Defendant pleaded, Not guilty, and it was found againſt him; And becauſe in the Declaration there was not any place of the Converſion, Judgement was ſtayed. Here in the Declaration, are two things, Firſt, the Conſpiracy, Secondly, the execution of it; for the one without the other will not maintain the Action, but here the Conſpiracy is not purſued, nor executed according to that which is laid to be conſpired. The Conſpiracie is laid, That the Factor upon his accompt demanded 4000 l. of Barbary money, per nomen, bona & denariorum ſummas, and the Execution is laid, That he demanded in allowance of wares delivered to Iſaac Abeſs: And he took a generall rule, That a Commander ſhall never be charged, but where his commandment is ſtrictly and preciſely purſued. Barbary money is included in this word Bona, for it is not currant in England: See as to the purſuing of the Commandment; Sanders and Archers Caſe, Plow. 18 Eliz. 437. And in our Caſe, he not only puts the thing, but alſo the perſon, for the Conſpiracy is that he demanded allowance for goods delivered to Iſaac, and his four ſons, for Iſaac, In the one Caſe it is pretended, That Iſaac and four ſons are Debtors; and in the other Caſe, Iſaac only: Alſo here Dawbeny hath allowed and accepted the accompt of the Factors, againſt which he cannot have this Action; for it is ignorantia craſſa, idque facti, quæ non excuſat: Alſo upon ſuch incertain

demand

demanded as is laid in the Declaration, Dawbeny was not holden to make allowance: i. for ſo much wares upon a certain bargain made with Iſaac; and that was not a lawfull demand, and upon ſuch uncertain demand, he was not bound to make allowance; Et hoc modo eſt ignorantia juris quæ non excuſat omnino. Alſo here Swinnerton onely accompts and demands allowances, and Swinnerton onely was not Factor, but alſo Tedcaſtel, and therefore Dawbeny was not bounden to allow that accompt to Swinnerton, no more then to a meer ſtranger: And alſo Dawbeny alone was not to make allowance, for the two Factors were accomptable to him, and to Goores alſo. And ſo allowance by one of them to whom they are accomptable, is not good. One Executor (where the power is committed to two) ſells the Land, the ſale is void, and two joynt Attorneys, &c. one only can do nothing: And here in this Declaration, It is many times alledged, that they were conjunctim Mercatores, conjunctim Factores; But I confeſſe, that one joynt Factor, with the expreſſe conſent of his companion, may accompt alone; and ſo of the other ſide, one may by expreſſe conſent take an accompt onely. One Factor is no Factor, where there are many joynt Factors; and in our Caſe, The two Goores and Dawbeny ſaw the accompt, but Dawbeny onely allowed of it, and that is not good: As if two Arbitrators are, and one onely makes the award, although both hear the matter. 14 E. 3. Fitz Acc. 72. That the one Accomptant cannot accompt without his companion; but there Parn ſaith, That it had been adjudged, 6 E. 3. that the one might accompt without the other: See 41 E. 3. 3. & 9. Tamworths Caſe. Tanfield contrary: As to the firſt Error, it is but Conveyance and matter of inducement to the fraud and conſpiracie, which is the principall point of the Action; and therefore needeth not to be ſo preciſely alledged: and alſo by the generall iſſue, they have paſſed the advantage of it, and all the ſpeciall matter of the Count is contained in the generall iſſue; for not guilty, goes to all, and includes the whole. Alſo upon the matter, the Jury hath found that they were joynt Merchants; and although they were joynt Factors, and the one onely hath accompted, yet the ſame accompt is good enough, for it was made with the conſent of the other, as appeareth by the Declaration. Conſpiraverunt, & agreaverunt, that Swinnerton in his accompt, peteret allowance, &c. ſo there was conſent to take the accompt, &c. and 6 E. 3. it is adjudged ut ſupra. And that the one joynt Factor may accompt without his companion, is the Law of Merchants; for Factors are often times diſperſed, ſo as they cannot be both preſent at their accompts, and ſo it hath been heretofore admitted in the Kings Bench: And as to that that Dawbeny onely hath given allowance to this accompt, the ſame is good enough: If I promiſe to two to do any act, the one of them may diſcharge me from it, and that by word, for it is but a perſonal thing: Two joynt-tenants of a Manor, grant the Stewardſhip thereof to one, and 20 l. per ann. for the exerciſe of it; if the one diſcharge him, it is a good diſcharge, as to the ſervice, but yet he ſhall have his Fee: If the Lord of a Manor grant the Stewardſhip thereof to another, taking 10 l. per ann. of the iſſues and profits of his Court there for his Fee, and afterwards the Lord diſchargeth the Steward, the ſame is void; for it is a diſadvantage to the Steward, for he cannot have his Fee, if no Courts be holden; but if the Fee be limited to iſſue out of Lands, there ſuch diſcharge is good; for there the Steward ſhall have his Fee, although that no Courts be holden there, See 18 E. 4. 8. to that purpoſe. Egerton Solliciter, to the contrary; although (as hath been objected) the matter of joynt Merchant be but matter of inducement, it is, notwithſtanding, materiall, and without it the Action will not lie: In Debt, upon Arbitrament, The Plaintiff in his Declaration, ought to ſhew the ſubmiſſion; and although the Defendant pleadeth, Nihil debet, yet if the place of the ſubmiſſion be not ſhewed in the Declaration, all is naught; for although that it

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be but inducement, yet it is a materiall inducement; for if no ſubmiſſion, no award, and if no award, no Debt, and then no cauſe of Action. The Caſe of 14 E. 3. cited before, there the Accomptants by their Deed, or joyntly, or ſeverally accomptable at the pleaſure of him to whom, &c. Alſo, becauſe it is ſet forth in the Declaration, that they were joynt-Merchants of wares, adventured into Barbary, for the ſpace of two years; the Factor in praying of allowance, ought to ſhew what wares were adventured into Barbary within the ſaid two years. Conſpiracy is a thing odious, and ought to be directly proved; and it is not reaſon, that that which he himſelf hath once allowed, he himſelf ſhall after defeat it, as here he attempts. And he relied much upon the variance between the Conſpiracy and the execution of it moved before by Coke, where by the Conſpiracy, Iſaac is made the Debtor, with is four ſons; and in the Execution, Iſaac is made the onely Debtor, and to that point, he vouched the Caſe, 3 & 4 Ph. & Ma. betwixt Brown and Nevil. That an award was to be performed, (ſcil.) an award made between Joh. Brown, for, and in the behalf of John Moore on the one part, and R. Nevil on the other part; and did not ſhew that Moore made the ſubmiſſion, and for that cauſe it was holden naught: For Moore was a principall perſon in the award, and Brown but a ſervant, &c. So in our Caſe for Iſaac. Popham Attorney General, in an Action upon the Caſe, The Plaintiff declares; Quod cum the Defendant, was indebted to the Plaintiff in 20l. he promiſed to pay to the Plaintiff 20 l. Here it needs not, that the Plaintiff ſhew in his Declaration, the place or time in which the Defendant became his debtor, for the promiſe is the principall matter, and the other matter is but inducement: So if A. in conſideration that I at his requeſt have married his daughter, promiſed to pay to me 100 l. In an Action upon the Caſe brought by me upon this promiſe, it is not neceſſary that I ſhew the place where I married his daughter. In all perſonall things, where two are chargeable to two, the one may ſatiſfie it, and one may accept of ſatisfaction, and binde his companion, and yet the one cannot have an Action without his companion, nor both only againſt one, 18 E. 4. 3. Two joynt-tenants of a Manno have one Bailiff of it, the one of them aſſignes Auditors to the Bailiff, who accompts, and is found in arrerages, the ſame is a good accompt, and it is holden there, that both, &c. may have Debt upon the arrearages of the accompt taken by the manner. And if one may aſſigne Auditors, he may alſo take accompt, and diſcharge the accomptant againſt his companion. And he conceived, That this allowance of the accompt by Dawbeny, did not exclude him of his Actions, but rather gave him cauſe of action, Nam Læſus non eſſet, niſi credidiſſet; and the Bailiff of my Husbandry, who bargains and ſells for me, if upon his accompt to me, he alledgeth and ſurmiſeth, that he hath ſold my cattell to one who is decayed, and upon that ſurmiſe I allow his accompt; afterwards, Re comperta, I ſhall have an Action of Deceit: And in this very Caſe, at the Bar, it was holden in the Kings Bench, That Dawbeny, notwithſtanding his allowance of this falſe accompt, ſhould have his Action, &c. Note that afterwards, viz Trin. 32 Eliz. The Judgement given for Dawbeny was reverſed.

Brown and Nevils *Caſe*.

Trin. 31 *Eliz.* In the Exchequer,

CI. Sir William Wallers *Caſe*.

IN this Caſe; It was moved by Winter, That if one hath Judgement in Debt, and upon that, within the year and day, ſues a Capias ad ſatisfaciendum, although that he doth not proſecute the ſame by the ſpace of two or three years, yet when he pleaſeth he may proceed thereupon, and he ſhall

not be put to a Scire facias; for a Writ of Execution once ſued forth, ſhall be a continual claim, and the party ſhall never be put to a Scire facias; and of ſuch Opinion was Philips.

Manwood, I grant, that if one hath ſued forth a Writ of Execution, and that be continued by Vicecomes non miſit breve, for two or three years, yet the Plaintiff may proceed thereupon, and ſhall not be put to a Scire facias: but if ſuch Writ be ſued forth, and not continued, but diſcontinued by a year and a day, he ſhall be put to a Scire facias, for it is negligence of the Plaintiff of not continuing of it, which within the year and day he might without Order of the Court, but after the year not by any Order of the Court, &c.

Trin. 31 *Eliz.* In the Exchequer.

CII. Griffins *Caſe.*

IT was holden in this Caſe, That if Leſſee for years of a Meſſuage grants totum Meſſuagium ſuum, the Grantee hath but at Will; but if he grant all his Intereſt and Eſtate in ſuch a Meſſuage, then the whole Leaſe paſſeth: and ſo it was ſaid to have been lately adjudged in the Caſe of one Winnybank in the Kings Bench.

Paſc. 26 *Eliz.* In the Kings Bench.

CIII. Seckford *and* Wolverſtons *Caſe.*

THe Plaintiff being Bayliff of the Liberty of Eſheld. in the County of Suffolk, the Sheriff of the ſaid County directed a Warrant unto him to arreſt the Defendant upon a Latitat returnable in the Kings Bench; by force of which the Defendant being arreſted, became bound in the Obligation upon which the Action is brought; the Condition of which is, That if the Defendant perſonally appear in the Kings Bench at Weſtminſter, and there to anſwer, &c. It was moved, that the Obligation was void by the Statute of 23 H. 6. For the form which the ſaid Statute preſcribes for Obligations to be taken by the Sheriff, is according to theſe words, Appear at the day contained in the Bill, Writ, or Warrant, and in ſuch place, &c. and that all Bonds taken in other form ſhall be void. As to the words of ſurpluſage [perſonally] the Juſtices were of Opinion, that the Obligation was well enough, notwithſtanding that becauſe, as the Caſe is, the appearance of the Defendant ought to be in perſon upon a Latitat, for the Defendant is ſuppoſed to be in Cuſtodia Mariſcal. And ſo it hath been adjudged in the Common Pleas, where the appearance of the party arreſted is de jure perſonal, &c. contrary where perſonal appearance is not requiſite. As to the other matter [and there to anſwer] Wray put a difference, where the words are [there to anſwer] that the Bond is well enough, for it is no more in effect, but that he ſhall appear eo animo ut reſpondeat. But if the words had been [Appear and anſwer] the ſame is a void Condition, for it may be that the Plaintiff will never declare againſt him: But Gawdy and Ayliff, Juſtices, were of a contrary Opinion, and that the Bond was void by reaſon of the words aforeſaid: but the Court would not give Judgment againſt the Plaintiff, but ex gratia Curiæ ſuffered the Plaintiff to diſcontinue his Action.

Paſc.

Paſc. 26 *Eliz.* In the Kings Bench.

CIV. Partridg *and* Pools *Caſe.*

IN an Action of Treſpaſs by Partridg againſt Pool, the Plaintiff did ſuppoſe the Battery at D. in the County of Midd. The Defendant juſtified, by reaſon of an Aſſault at S. in the County of Gloceſter, abſque hoc that he beat the Plaintiff at D. in the County of Midd. upon which Traverſe the Plaintiff did demur in Law. It was argued by Popham, Attorny-General, That the Traverſe of the County is good; and he put the Caſe 21 H. 6. 8, and 9. In Treſpaſs of Battery at D. in the County of York, the Defendant doth juſtifie by an Aſſault at London, in ſuch a place in ſuch a Pariſh, and the hurt which, &c. abſque hoc, that he was guilty de aliqua tranſgreſſione in Com. Ebor. upon which iſſued a Venire facias into Yorkſhire, and as the book is, the Traverſe to the County was taken with great deliberation, &c. prout, &c. See alſo 22 E. 4. 39. And the Traverſe de jure ought to be allowed, for the Jury of Midd. are not bounden to finde the Aſſault in the County of Gloceſter: See 2 Ma. Br. Jurors 50. In Actions upon tranſitory matters, although they be layd in Foreign Counties, yet the Jurors, if they will, may give their Verdict, but they are not bounden to it.

Egerton, Sollicitor, contrary; And he put a difference, where the juſtification is local, and where tranſitory: As in falſe Impriſonment the Defendant juſtifies, as Sheriff, the taking of the Plaintiff by vertue of a Capias directed to him at D. within the County of G. where the Plaintiff declares of an Impriſonment in another County, there the Traverſe of the County is good; for the Defendant could not take the Plaintiff by force of the ſaid Proces in any other County, then where he himſelf is Sheriff, and ſo the juſtification is local: 11 H. 4. 157. But in our Caſe the matter of the juſtification is meerly tranſitory. And at laſt, after many motions, it was adjudged, That in the principal Caſe the County was not Traverſable; and ſo Judgment was given for the Plaintiff; Gawdy, Juſtice, being of a contrary Opinion: but by Wray clearly, The Jurors are bounden, upon pain of Attaint, to take notice of ſuch a tranſitory thing done in another County: which ſee 2 Ma. Br. Attaint 104. 9 H. 6. 63.

Paſc. 26 *Eliz.* In the Kings Bench.

CV. Daws *and* Mollins *Caſe.*

IN an Attachment upon a Prohibition by Daws againſt Mollins, for that the Defendant traxit Querent. in Curiam Chriſtian. for Tythes of great Trees, ſub nomine ſylvæ cedux: The Defendant pleaded, that the Lopings for the Tythes of which he ſued, were the Lopings of Trees, called Aſp, Beech, and Oak, de ſtipitibus prius ſuccifis creſcentes; and alſo for Hornbeams, Maples, Hazels, &c. The Plaintiff, as to the Aſp, Oak, and Beech, did demur in Law; and as to the reſidue, he pleaded, that with part he mended the Hedges, and the reſt being de minimo valore, were bound up with the boughs of the Oak, &c. into Faggots; upon which the Defendant did demur in Law. It was argued by Egerton, Sollicitor, on the part of the Plaintiff; and he held, That a Wood of common Right ought not to pay Tythes, not becauſe the ſoyl in which it groweth yields other Tythes of the Herbage, but becauſe non renovantur in annum; and there-

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fore at this day no Conſultation ſhall be granted for Quarry, Stone, and Coals: But after came the Statute of Sarum, (vide F. N. B. 51. h.) by which it was agreed, coram Concilio Regis in Parliamento apud Sarum, Quod Conſultationes fieri debeant de ſylva cedua, eo non obſtante quod non renovantur per annum: and ſee to that purpoſe the Regiſter 49. Et ulterius, ſuper hoc facta fuit quædam Conſultatio pro Abbate de Notley de ſylva cedua: which Statute was afterwards expounded by the Statute of 45 E. 3. cap. 3. not to extend to great Wood of the growth viginti annorum, vel amplius, but onely to ſuch Wood which is called Sylva Cedua. And at laſt, after many motions, it was ruled, That becauſe the Defendant had not ſhewed, that the Trees, (ſcil.) Oak, Aſh, and Beech, were not before cut within twenty years before the laſt ſucciſion, of which the Tythes are now demanded, Tythes ſhall not thereof now be payd. And as to the other point, That the Hornbeams, Sallows, &c. did grow ſparſim amongſt the Oaks, and the Owner felled the whole Wood, and cauſed them to be promiſcuouſly cut out into Faggots, and bound up in Faggots together, and the moſt part of every Faggot was Oak, and the reſidue was of little value, ſo as the ſeverance of the Sallows, &c. from the Oak, &c. would not quit the charge; in ſuch caſe Tythe ſhall not be payd: but of the other part, If the moſt part of the Wood be Sallows, &c. and here and there ſparſim groweth an Oak, &c. and the Owner cuts down all the Wood, and makes Faggots as before, Tythes in ſuch caſe ſhall be payd of them.

Trin. 26 *Eliz.* In the Exchequer.

CVI. *The* Queen *and Lord* Lumleys *Caſe*.

BEtwixt the Queen and the Lord Lumley, it was moved in the Exchequer; Queen Mary ſeiſed of the Rectory of D. granted advocationem Eccleſiæ de D. If now by this Grant the Advowſon paſſeth as now diſappendant, or the Rectory it ſelf paſſeth as appropriate? or nothing at all paſſeth? was the Queſtion. And by Manwood, chief Baron, the Advowſon doth not paſs, but doth remain appropriate, as it was before; for the Church, as it was appropriate by a judicial act, ſo without ſuch an act it cannot be diſappropriate: And he ſaid, That by the Grant of the Advowſon, the Rectory did not paſs; for by the Appropriation the Advowſon is gone, and is not in eſſe, and ſo by conſequence cannot be granted: And it is not within the Statute of 4 and 5 Ph. and Ma. of Confirmation of Grants of the King; for the ſaid Statute doth help but miſrecital, miſnaming, miſtaking, &c. but here there is no ſuch thing in rerum natura, as the Patentee pretendeth to be paſſed by the Patent: and if it were in the caſe of a Subject, nothing would paſs; as it was adjudged in one Sands Caſe; 11 Eliz. And he ſaid, That at this day a Parſonage may be diſappropriated, but that ought to be by a judicial act, as by Preſentment, and not by any other private act of the Proprietor: And ſo he ſaid, a Church was diſappropriated by the Lord Dyer, by Preſentment, which of late he made unto it.

Sands *Caſe*.

Trin. 26 *Eliz.* In the Kings Bench.

CVII. Herring *and* Badlocks *Caſe*.

1. C. Cro. Eliz. 30.

A Replevin was brought by Herring againſt Badlock, who avowed for damage-feaſant, and ſhewed, That the Lady Jerningham was ſeiſed of ſuch a Manor, whereof the place where, &c. and Leaſed the ſame to the Defendant for years, &c. The Plaintiff ſaid, That long time before

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King Henry the eighth was ſeiſed of the ſaid Manor, and that the place where, &c. is parcel of the ſaid Manor demiſed and demiſable by Copy, &c. And that the ſaid King, by ſuch a one his Steward, demiſed and granted the ſaid parcel unto the Anceſtor of the Plaintiff, whoſe Heir he is, by Copy in Fee, &c. and upon that there was a Demurrer, becauſe that by that bar to the Avowry the Leaſe ſet forth in the Avowry is not anſwered, for the Plaintiff in the bar unto the Avowry ought to have concluded; And ſo was he ſeiſed by the Cuſtom, until the Avowant prætextu of the ſaid term for years entered: And ſo it was adjudged.

Trin. 28 *Eliz.* In the Kings Bench.

CVIII. Moor *and Sir* John Savages *Caſe*.

IN an Action upon the Caſe by Moor againſt Sir John Savage and his Wife, for that the ſaid Lady had reported, That Moor was a lying Knave, and a perjured Knave; The Defendant juſtified, That where an Eſtate for life abſolute was deviſed to the ſaid Lady by her former Huſband, the Plaintiff had depoſed, that the ſaid Land was deviſed to the ſaid Lady, if ſhe kept her ſelf ſole: To which the Plaintiff replicando ſaid, Of his own wrong without ſuch cauſe: Egerton, Sollicitor, did demur upon it; for he ſaid, The Plea goeth to all the juſtification before; for where part of a Plea, (ſcil.) the juſtification, is matter of fact, and part is matter of Record, there, Of his own wrong, &c. is no good Plea, but there ought to be a ſpecial Traverſe, abſque hoc, that he ſo depoſed, or abſque hoc, that the Deviſe was abſolute: And this Plea here, Of his own wrong, &c. goes to matters in fact onely, and ſuch which lie in the notice of the Jury: See 5 H. 7. 6. Although that divers matters are alledged in the bar, yet this Plea, Of his own wrong without ſuch cauſe, &c. extends to all, where no matter of Record is alledged in the Plea: As in falſe Impriſonment, a Capias is directed to the Sheriff, being Defendant, to arreſt the Plaintiff, in ſuch caſe ſuch general Plea is not good; but there he may plead Nul tiel Record: See alſo 13 H. 7. 3. 21 H. 6. 5. And here a principal matter in the juſtification is matter of Record, and therefore ſuch a Plea here is not good. Altham contrary, If the principal matter in ſuch juſtification be matter of Record, then ſuch a Plea is not ſufficient; but if the matter of Record be but inducement, then the Plea is good enough: And he vouched 45 E. 3. 7. In Treſpaſs the Defendant ſaith, That he is Foreſter of the Foreſt of B. and at a Swanmoot it was preſented by the Foreſters, Verderors, Regardors, and Agiſtors, That the Plaintiff had taken Deer in the ſaid Foreſt, upon which the Defendant came to the Plaintiff, and prayed him to finde Pledges to anſwer before Juſtices in Eyre, &c. and he refuſed ſo to do, for which cauſe he kept the Plaintiff until he made agreement, and demanded Judgment, if any wrong, &c. and The Plaintiff replicando ſaid, Of his own wrong, &c. and the iſſue was accepted of by the Court; yet he ſaid, the Preſentment in the Swanmoot was matter of Record, but onely inducement, and the Requeſt to finde Sureties, which he would not, for which cauſe he took and impriſoned him, the ſame was the principal matter, and but matter in fact; and therefore he ſaid, that the Plea was good; and he ſaid, that in this caſe the Oath is not on Record. And Coke ſaid, That in the Caſes put by Altham, Of his own wrong without ſuch cauſe, is a good Plea, with an abſque hoc unto the matter of Record: See the Book of Entries 320. and ſee 30 H. 8. Action upon the Caſe 104. without that, that he ſwore modo & forma: It was adjourned.

Trin. 28 *Eliz.* In the Common Pleas.

CIX. Firrell *and the Hundred of* B's *Caſe.*

IN an Action upon the Statute of Hue and Cry by Firrell againſt the Hundred of B. The Defendants pleaded, Not guilty, and in Evidence, the Plaintiff, to prove that he was robbed, as he had declared, offered to the Jury his oath, in making good his Declaration, which Anderſon and Periam Juſtices, utterly refuſed. But Windham affirmed, That ſuch an oath had been accepted in the Caſe of one Harrington, where the Plaintiff could not have other Evidence to prove his Cauſe, in reſpect of ſecrecie; For thoſe who have occaſion to travell about their buſineſſe, will not acquaint others what money, or other things they have with them in their journeys: And we ſee, that in ſome cauſes, the Law doth admit the oath of the party in his own cauſe; as in Debt, the Defendant ſhall wage his Law: Periam, Thats an ancient Law, but we will not make new Preſidents, for if ſuch oath be accepted in this Caſe, by the ſame reaſon in all caſes where is ſecrecie, and no externall proof, upon which would follow great inconveniences: and although ſuch an oath hath been before accepted of, and allowed here, yet the ſame doth not move us; and we ſee no reaſon to multiply ſuch Preſidents. The Declaration is, that the Plaintiff was robbed of 10l. de denariis ipſius querentis; and upon the Evidence it appeareth, That the Plaintiff was the receiver of the Lady Rich, and had received the ſaid money for the uſe of the ſaid Lady, and exception was taken to it by Shuttleworth, but it was not allowed; for the Plaintiff is accomptable to the Lady Rich for the ſaid money. And it was agreed, that if he who was robbed, after he hath made Hue and Cry, doth not further follow the thieves, yet his Action doth remain.

Mich. 29 *Eliz.* In the Kings Bench.

CX. Larges *Caſe.*

THe Caſe was, A. ſeiſed of Lands in Fee, deviſed the Lands to his wife, untill William his ſon ſhould come to the age of 22 years, and then the Remainder of part of the Lands to his two ſons, A. and John, The Remainder of other part of his Lands, to two others of his ſaid ſons, upon condition, That if any of his ſaid ſons before William ſhould come to the age of 22 years ſhall go about to make any ſale of any part, &c. he ſhall for ever loſe the Lands, and the ſame ſhall remain over, &c. And before his ſaid ſon William came to the age of 22 years, one of the other ſons Leaſed that which to him belonged, for 60 years, and ſo from 60 years to 60 years, untill 240 years ended, &c. Bois, A. and J. are joynt-tenants of the Remainder, and he ſaid, That the opinion of Audley, Lord Chancellor of England, is not Law. (ſcil.) where a man deviſeth Lands to two, and to their heirs, they are not joynt-tenants, as to the ſurvivor, but if one of them dieth, the ſurvivor ſhall not have the whole, but the heir of him that dieth ſhall have the moyetie: See 30 H. 8. Br. Deviſe 29. And he ſaid, That this Leaſe, although it be for ſo many years, is not a ſale intended within the Will, and ſo is not a Joynture. 46 E. 3. One was bounden, that he ſhould not alien certain Lands, and the Obligor did thereof enfeoff his ſon and heir apparent, the ſame was held to be no Alienation within the Condition of the Obligation: Of the other ſide it was argued, The remainder doth

not

not veſt preſently; for it is incertain, if it ſhall veſt at all; for if William dieth before he cometh to the age of 22 years, it was conceived by him, that the remainder ſhall never veſt, for the words of the Will are, Then the Land ſhall remain, &c. 34 E. 3. Formedon 36. Land is deviſed to A. for life, and if he be diſturbed by the heir of the Deviſor, that then the Land ſhall remain to D. Here D. hath not any remainder, before that A. be diſturbed; It was further argued, that here is a good Condition, and that the Deviſee is not utterly reſtrained from ſale, but onely untill a certain time, (ſcil.) to the age of William of 22 years. And it was ſaid, that this Leaſe is a Covenous Leaſe, being made for 240 years, without any Rent reſerved: As ſuch a Leaſe made for 100 years, or 200 years, is Mortmain, as well as if it had been an expreſſe Feoffment, or Alienation. But it was ſaid by ſome, that here is not any ſale at all, nor any Leaſe; for the Leſſor himſelf hath not any thing in the Land demiſed: As if a man diſſeiſeth a Feme ſole, and Leaſeth the Lands, and afterwards marrieth the diſſeiſee, he ſhall avoid his own Leaſe, 5 E. 3. Dae was bound that he ſhould not alien ſuch a Manor, the Obligor alieneth one acre parcell of it, the Obligation is forfeit, See 29 H. 8. Br. Mortgage 39. A. Leaſeth to a Religious houſe for 100 years, and ſo from 100 years to 100 years, untill 800 years be encurred, the ſame is Mortmain, Vide Stat. 7 E. 1. Colore termini emere, vel vendere. And in the principall Caſe, If the Deviſee had entred into a Statute to the value of the Land Leaſed, by the intent of the Will, the ſame had been a ſale; and ſuch was the opinion of the whole Court: and by the Court, the word in perpetuum, ſhall not be referred to the words precedent, but unto the words following; (ſcil.) in perpetuum perdat, the Lands. And if a cuſtom be in the Caſe that the Infant of the age of 15 years may ſell his Lands; If he make a Leaſe, the ſame is not warranted by the cuſtom: And afterwards it was adjudged by the whole Court, that the Leaſe made as before, was a ſale within the intent of the Will of the Deviſor.

Hill. 29 *Eliz.* In the Kings Bench.

CXI. Brookes *Caſe.*

APpeal of Burglary was brought againſt Brooke, who was found guilty; and before Judgement given, the Plaintiff died, And now Egerton moved that Judgement be given for the Queen upon that Verdict, or at leaſt that the Declaration in the Appeal ſhould be in lieu of an Endictment, and that the Appealee be thereupon arraigned and put to anſwer the ſame. For if the Appealant had been Nonſuit, or releaſed, the Defendant ſhould be arraigned at the ſuit of the Queen. Coke, God hath now by the death of the party, delivered the Defendant; and it is not like, where the Plaintiff releaſeth, for there it is the default of the Act of the party, but here it is the Act of God; and he held it for a rule, That where auterfoits acquit, is a good Plea, there alſo auterfoits convict, ſhall be a good Plea: And it was holden in Sir Tho. Holcrofts Caſe, That where the party is convicted at the ſuit of the Queen, there the Appeal doth not afterwards lie. Wray, If the Appellant dieth before Verdict, the Defendant ſhall be arraigned at the ſuit of the King; But if his life hath beene once in jeopardy by Verdict, he conceived, that it ſhall not again be drawn into danger; and ſome were of opinion, That the Defendant ſhould be arraigned at the ſuit of the Queen upon the whole Record, and plead auterfoits acquit, and that they ſaid was the ſureſt way,

Sir Thomas Holcrofts *Caſe.*

Eliz.

29 *Eliz.* In the Exchequer.

CXII. Ognel *and* Paſtons *Caſe.*

CLement Paſton was Defendant in an Action of Debt brought againſt him by George Ognel, upon an Eſcape; and the Caſe was this: Francis Woodhouſe was bound in a Recognizance to the ſaid Ognel; Whereupon Ognel ſued forth a Scire facias, and upon two Nihils returned, had Judgement, and upon that a Levari facias, and then a Capias ad ſatisfaciendum, upon which Paſton the Defendant, a Sheriff of Norfolk, to whom the Capias was directed, took the party, and afterwards ſuffered him to eſcape. The Defendant pleaded, That before the ſaid Capias, the ſaid Francis Woodhouſe was committed to him, and in his ward continued for Felony; and after the Capias, was Endicted thereof, and arraigned, and found guilty, after which he eſcaped; And all this was found by ſpeciall Verdict: Firſt it was argued, If upon a Recognizannce acknowledged in the Chancery an Action lieth; and it was ſaid by Bois, That it doth not lie in the mouth of the Sheriff to ſay, that this Capias doth not lie in the Caſe: As if a Juſtice of Peace maketh a Warrant to a Conſtable, which warrant is not good in Law, yet the Conſtable is not to examine that, or to diſpute the validity of it, 5 H. 7. And a Capias hath lain in ſuch caſe, and ſo it hath been the courſe for the ſpace of 200 years: and he ſaid, That although Francis Woodhouſe was convict of Felony, yet the ſame is not any diſcharge of the Execution, as 35 H. 6. 8. although the husband be attainted of Felony, yet he is not ſo dead in Law, but if the King pardon him afterwards, he ſhall be reſtored, and his wife ſhall have Dower; and if he be killed, his wife ſhall have an Appeal: 12 H. 4. My Villain is attainted, the ſame is no diſcharge of his villainage as to me; But if the King pardon him after, he ſhall be my Villain, 6 E. 4. 4. One is in Execution pro fine Regis, and afterwards is Outlawed of Felony, and hath his Charter of pardon for the Felony, yet he remains in Execution for the intereſt of the party, for there the Execution is not extinct, but only ſuſpended. Godfrey contrary, Capias doth not lie upon a Recognizance; but if Debt be brought upon a Recognizance, and the plaintiff recovereth, then a Capias lieth; which ſee 14 Eliz. Dyer 306. Puttenhams Caſe. 2 H. 4. 6. In Dower the Demandant recovereth her Dower, and damages, and prayeth a Capias ad ſatisfaciendum for the damages, but ſhe could not have it; for no Capias lieth upon the Originall; and to the ſame purpoſe, ſee 8 R. 2. Fitz. Execution, 164. 15 H. 7. 15. Capias pro fine lieth for the King, where no Capias lieth in the Originall; but no Capias ad ſatisfaciendum for the party; no Capias in Debt before the Statute of 25 E. 3. and ſee the Stat. of Weſt. 2. cap. 18. cum debitum fuerit recognit. ſi in electione ſequent. execut. habere per Fieri facias, or Elegit, therefore no other manner of Execution; for the Statute hath provided, ut ſupra. And he ſaid, That debt doth not lie upon a Statute, Merchant, or Staple: See 15 H. 7. 16. Another Reaſon why a Capias doth not lie in ſuch caſe, is upon the words of the Recognizance, Et niſi fecerit, tunc concedit, quod ſumma prædict. levetur de bonis & catallis, terris & tenementis; Ergo, not of the body. And when Woodhouſe was convict of Felony, the Queen had an Intereſt in his body, and upon the pardon, the Execution which was ſuſpended during the conviction, is now revived: And he confeſſed the caſe of Villainage; that during the attainder, the Lord cannot meddle with the Villain in the preſence of the King, See 27 Aſſ. 49. and ſee 2 H. 4. 65. A. was condemned to B. in certain damages upon an Action of Treſpaſſe brought by B. againſt A. and A. was commited to Newgate, in Execution upon a Capias ad ſatisfaciend. and afterwards was arraigned of a Felony,

Felony, and thereof attainted, and committed to the Ordinary, as Clark Attaint. And the Juſtices commanded the Ordinary, That after that the priſoner had made his purgation, that he ſhould not let him go at large, but ſhould conduct him to the priſon of Newgate again: And there is a Quære made by the Reporter, If after purgation the Ordinary might ſuffer him to eſcape; and if he at whoſe ſuit he was condemned in Treſpaſſe ſhall have debt againſt the Ordinary for ſuch eſcape. At another day the matter was argued by Coke for the Plaintiff, at the common Law, No land was ſubject to Execution, i. no Lands of the Debtor himſelf; but yet the Lands of the Debtor being deſcended to his heir, ſhould be chargeable to the Obligee of the Debtor, in which he and his heirs were bound, and that ſeemed to be very ſtrange; and he conceived, That in that point, cuſtom and uſage had encroched upon the common Law: The Statute of Weſt. 2. c. 13. gave Elegit of the moyetie of the Lands, But yet there was no Capias in Debt before, 25 E. 3. cap. 17. before which Statute, it was a generall Rule, That no Capias lay at the Common Law, but where the King was to have a Fine, See 35 H. 6. 6. At the Common Law Capias did not lie but where the Action is vi & armis, or that the King is to have a Fine; For there was Outlawry at the Common Law in ſuch caſe. It will be objected, That the Statute of 25 E. 3. which gave Capias in Debt, doth not extend to a Scire facias upon Recovery; That ſuch Proces ſhall be made in a Writ of Debt, as is uſed in a Writ of Accompt; and here is no Writ of Debt, but a Scire facias onely: If my Debtor upon an Obligation cometh without a Writ, and confeſſeth the Debt, I ſhall have a Capias againſt him, and yet the ſame is not in a Writ of Debt: Ergo, So in caſe of Recognizance. Where a Statute ſpeaks preciſely of a Writ Originall; yet oftentimes by Equity it ſhall extend to a Scire facias, and other judiciall Proces: As upon the Stat. of 25 E. 3. cap 7. which enables the Incumbent to plead in a Quare Impedit. It ſhall extend to a Scire facias upon a Recovery in a Quare Impedit, 46 E. 3. 13. And if in our caſe, a Capias doth not lie by the Letter, yet it lieth by Equity: And he ſaid, That Statute which helps the Subjects to get their debts and rights, are to be, and have been taken beneficially and liberally expounded, in advantage of the Creditors. And ſee 48 E. 3. 14. Where a Scire facias is ſued upon a Recognizance, a Capias doth not lie, but there it is holden, that in a Scire facias, upon a Recovery in debt, a Capias lieth. And as to this Capias, the Sheriff is but the miniſter to the Court, and he is not to controll the Court, but to accept of the ſame, as the ſame is directed to him. It is a common learning in our Law; That although the Court doth proceed, inverſo ordine, yet it ſhall not be utterly void, 36 H. 6. 34. Judgment given at the common Law of Lands within the five Ports; for the five Ports in times paſt, were parcell of the Crown: But of Lands in Wales it was otherwiſe before the Statute of 27 H. 8. by which Wales is united to the Crown. And although that the Capias erronice Emanavit, the ſame is but erroneous, and ſo voidable, and not void; for error may be aſſigned in the Executione judicii, as in redditione judicii, 16 H. 7. 6. Outlawrie without an Originall Writ, is not void, but voidable, 2 R. 2. and the reaſon thereof is given, 11 H. 7. in Collins Caſe, becauſe they are Judges of the cauſe, although that their proceedings be not according to Law. But the Sheriff, or any other ſtranger, ſhall not take advantage thereof, See 8 E. 4. 21 E. 4. and he cited to this purpoſe, 13 E. 3. Barre 253. The Jaylor ſhall not take advantage of undue proceedings of the Auditors againſt an Accomptant; and he inſiſted much upon the Uſage and Preſidents, and cuſtoms of Courts which are Laws in ſuch caſes. And although that by ſtrict and preciſe rule of Law, a Capias doth not lie naturally nor properly upon a Recognizance, where the ſuit begins by Scire facias, yet becauſe the uſuall practice, and common experience hath allowed of it,

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Felony, and thereof attainted, and committed to the Ordinary, as Clark Attaint. And the Juſtices commanded the Ordinary, That after that the priſoner had made his purgation, that he ſhould not let him go at large, but ſhould conduct him to the priſon of Newgate again: And there is a Quære made by the Reporter, If after purgation the Ordinary might ſuffer him to eſcape; and if he at whoſe ſuit he was condemned in Treſpaſſe ſhall have debt againſt the Ordinary for ſuch eſcape. At another day the matter was argued by Coke for the Plaintiff, at the common Law, No land was ſubject to Execution, i. no Lands of the Debtor himſelf; but yet the Lands of the Debtor being deſcended to his heir, ſhould be chargeable to the Obligee of the Debtor, in which he and his heirs were bound, and that ſeemed to be very ſtrange; and he conceived, That in that point, cuſtom and uſage had encroched upon the common Law: The Statute of Weſt. 2. c. 13. gave Elegit of the moyetie of the Lands, But yet there was no Capias in Debt before, 25 E. 3. cap. 17. before which Statute, it was a generall Rule, That no Capias lay at the Common Law, but where the King was to have a Fine, See 35 H. 6. 6. At the Common Law Capias did not lie but where the Action is vi & armis, or that the King is to have a Fine; For there was Outlawry at the Common Law in ſuch caſe. It will be objected, That the Statute of 25 E. 3. which gave Capias in Debt, doth not extend to a Scire facias upon Recovery; That ſuch Proces ſhall be made in a Writ of Debt, as is uſed in a Writ of Accompt; and here is no Writ of Debt, but a Scire facias onely: If my Debtor upon an Obligation cometh without a Writ, and confeſſeth the Debt, I ſhall have a Capias againſt him, and yet the ſame is not in a Writ of Debt: Ergo, So in caſe of Recognizance. Where a Statute ſpeaks preciſely of a Writ Originall; yet oftentimes by Equity it ſhall extend to a Scire facias, and other judiciall Proces: As upon the Stat. of 25 E. 3. cap 7. which enables the Incumbent to plead in a Quare Impedit. It ſhall extend to a Scire facias upon a Recovery in a Quare Impedit, 46 E. 3. 13. And if in our caſe, a Capias doth not lie by the Letter, yet it lieth by Equity: And he ſaid, That Statute which helps the Subjects to get their debts and rights, are to be, and have been taken beneficially and liberally expounded, in advantage of the Creditors. And ſee 48 E. 3. 14. Where a Scire facias is ſued upon a Recognizance, a Capias doth not lie, but there it is holden, that in a Scire facias, upon a Recovery in debt, a Capias lieth. And as to this Capias, the Sheriff is but the miniſter to the Court, and he is not to controll the Court, but to accept of the ſame, as the ſame is directed to him. It is a common learning in our Law; That although the Court doth proceed, inverſo ordine, yet it ſhall not be utterly void, 36 H. 6. 34. Judgment given at the common Law of Lands within the five Ports; for the five Ports in times paſt, were parcell of the Crown: But of Lands in Wales it was otherwiſe before the Statute of 27 H. 8. by which Wales is united to the Crown. And although that the Capias erronice Emanavit, the ſame is but erroneous, and ſo voidable, and not void; for error may be aſſigned in the Executione judicii, as in redditione judicii, 16 H. 7. 6. Outlawrie without an Originall Writ, is not void, but voidable, 2 R. 2. and the reaſon thereof is given, 11 H. 7. in Collins Caſe, becauſe they are Judges of the cauſe, although that their proceedings be not according to Law. But the Sheriff, or any other ſtranger, ſhall not take advantage thereof, See 8 E. 4. 21 E. 4. and he cited to this purpoſe, 13 E. 3. Barre 253. The Jaylor ſhall not take advantage of undue proceedings of the Auditors againſt an Accomptant; and he inſiſted much upon the Uſage and Preſidents, and cuſtoms of Courts which are Laws in ſuch caſes. And although that by ſtrict and preciſe rule of Law, a Capias doth not lie naturally nor properly upon a Recognizance, where the ſuit begins by Scire facias, Yet becauſe the uſuall practice, and common experience hath allowed of it,

And admitted thereof from time to time: It is ſafer to ſuffer a miſchief to one, then an inconvenience to many. And although the Proverb, Exempla illuſtrant non docent, aut probant, may hold place in ſome Arts and Sciences, yet in our Law, Examples are good Arguments, 11 E. 4. 3. In the Kings Bench, a man in cuſtodia Mariſchalli, ſhall be put to anſwer a Bill, but in the Common Bench, a man who is in the cuſtody of the Guardian of the Fleet, ſhall not be put to anſwer to a Bill, and that is by reaſon of the ſeverall uſages and cuſtoms in the ſaid ſeverall Courts; ſo as cuſtom and uſage makes a Law in ſuch caſe. 39 H. 6. 30. in a Writ of Peſne, The Judges were cleer of opinion, That the Plaintiff ought not onely to ſhew the Tenure betwixt him and the Tenant Peravail, but alſo betwixt the Peſne and the Lord Paramount; yet when they had conferred with the Preignothories, and ſaw the Preſidents of former times in ſuch caſes, They would not change the former courſes, notwithſtanding that their opinions were to the contrary: So 2 H. 7. 8. The Venire facias is, 12 liberos & legales homines, and the Sheriff returned, 24, and holden good, by reaſon of the uſuall courſe of the Court in ſuch caſes; and yet in our Law, the number of perſons is not materiall, which ſee in the Earl of Leiceſters Caſe, 15 H. 8. but cuſtom diſpenſeth with the ſame.

Atkinſon argued the contrary; At the common Law for Execution in Debt within the year, a Levari facias, and a Fieri facias lay; after the year the party was put to a new Original; and there was no Capias at the common Law, but in caſes of contempt, force, or other notable miſdemeanor, until the Statute of 25 E. 3. cap. 17. which gave it in Debt, Detinue, &c. And the Statute of Weſt. 2. cap. 18. gave Fieri facias and Elegit, but no Capias was given upon a Recognizance by any Statute, and he relyed much upon the Book of 48 E. 3. before cited, the rule of which Book is, That in a Scire facias upon an Original in which a Capias lieth, a Capias lieth, for the Scire facias ſhall follow the nature of the Original upon which it is founded: but where a Capias ad reſpondendum doth not lie, there not a Capias ad ſatisfaciendum, 34 H. 6. 451. In Debt againſt Executors, they appear and plead fully adminiſtred, and it is found againſt them, and Judgment is given for the Plaintiff, who after the year ſueth a Scire facias againſt the Executors, and Execution awarded by default, and thereupon a Capias and Exigent: And that matter being ſhewed to the Court, a Superſedeas was granted, becauſe the Capias improvide & erronice emanavit: for no Capias lieth againſt Executors where they plead, &c. although it be found againſt them, Ergo, neither a Scire facias grounded thereupon. And although the Statute of 25 E. 3. gives a Capias in Debt, yet if Debt be recovered upon a Juſticies, a Capias doth not lie by the Equity of the ſaid Statute: and he replied very ſtrongly upon Puttenhams Caſe, 13 Eliz. cited before. And as to that which hath been ſaid; That notwithſtanding, that the Capias was againſt the Law, and ſo his impriſonment by colour thereof wrongfull, yet, de facto, he was in priſon, and the Sheriff hath taken him, and he ſhall excuſe himſelf in a falſe impriſonment brought; yet I ſay, That this erroneous proces appearing to you; You will not again erre, by allowing theſe erroneous proceedings, but rather reform them: For the Sheriff himſelf, who is a ſtranger to the Record, cannot have Error to reverſe theſe proceedings, and ſo without remedy, unleſſe the Court doth relieve him therein. And he ſaid farther, That this Capias, Poſito quod legitime emanavit, cannot faſten or work upon Francis Woodhouſe, being impriſoned convict of Felony; for being impriſoned, and reſtrained of his liberty, how can he (his reſtraint continuing) be de novo reſtrained before that he be enlarged and reſtored to his liberty? Nam omnis privatio præſupponit habitum; and Ergo, impriſonment, liberty precedent. And ſo he concluded, That Francis Woodhouſe, Neque de facto, nor de jure, was in priſon;

priſon; and that no Capias lieth in the Caſe, eſpecially after the year, as here it was, and the party being convict and in priſon, cannot be taken, &c. Manwood, If within the year a Levari facias, or a Fieri facias be ſued forth, and be returned, not ſerved, or that Vicecomes non miſit Breve, and ſo the year paſſeth in the default of the Sheriff; yet the Plaintiff ſhall not be put to a Scire facias. At another day it was argued by Tanfield for the Defendant, That upon this Scire facias no Capias lieth, and then no lawfull Execution, and then no eſcape. Where there is no Capias in the Originall, there is no Capias in the Execution, but here in our Caſe, there is not any Originall, becauſe it is a Scire facias upon a Recovery, Ergo, no Capias can be where there is not any Originall. As to that which hath been ſaid, That the ancient Preſidents and courſe in Cancel. is againſt us; be it ſo: yet the courſe in the Kings Bench and Common Pleas is with us, That a Capias doth not lie in ſuch caſe of Scire facias. And the Chancery, as to the Common Law ought not to vary from theſe Courts, for one and the ſame Common Law ought to be in all the ſaid Courts, of things of the Common Law, and the Preſidents alledged of the other ſide are ſilent, and ſleeping proceedings and preſidents, Slips of Clerks, which were never drawn into queſtion; the ancienteſt of which was hatcht but in the later part of the Reign of King H. 8. And if the Common Law doth not warrant ſuch Executions, Truly the preſidents cannot make ſuch impriſonments lawfull without Act of Parliament. It hath been ſaid, that Executions ought to be favoured, that is true, but alſo Liberty, to which the Law hath ſpeciall reſpect: See the Statute of Magna Charta, Nullus liber homo capiatur, vel impriſonetur, niſi per legale judicium parium ſuorum, vel per legem terræ; and this is not Lex terræ, but uſage onely: and Malus uſus eſt abolendus, 26 Eliz. Error was brought upon a Judgement given in Curia de Woodſtock, which is a Court of Record, and Error aſſigned, for that they had awarded Execution ſecundum conſuetudinem Villæ, againſt one who had bailed the Defendant without a Scire facias firſt ſued forth againſt him, i. the baylee, and it was adjudged Error, and the cuſtom could not maintain it, for the Bailee might have a releaſe or other matter of diſcharge to plead: And he cited the Caſe of 13 and 14 Eliz. Dyer 306. That upon a Scire facias out of a Recognizance in Chancerie, Judgement was given for the Plaintiff, and the Warden of the Fleet was commanded to detain the Conuſor in his cuſtody, in Execution for the Plaintiff, and afterwards the Conuſor eſcaped, the Plaintiff not ſatisfied, And it was holden no eſcape, for his body was not liable, in caſe of a Recognize to the Execution: and ſee alſo the book of Entries, 500 there is a Rule put, If the Recognizee will have Execution within the year, he may have a Fieri facias, or Elegit, but not a Capias ad ſatisfaciendum. And he conceived, that this Proces is not onely erroneous, but alſo utterly void: As a Capias in a Formedon, contrary where in Debt a Capias is awarded after the year, where it ought to be Scire facias, the ſame is but erroneous; for ſuch Proces lieth upon ſuch Judgement, if he had not ſurceaſed his time. Another matter he moved, becauſe this iſſue is not well tried, for it was tried by Niſi prius out of the Exchequer, and the Statute of Weſt. 2. cap. 30. Mar. 14 E. 3. cap. 1. do not give Niſi prius in Cauſes out of the Exchequer but only out of both Benches; but Cauſes out of the Exchequer are tried by Commiſſion; and here their Commiſſion was inſufficient; for it was directed, Chr. Wray and Williel Periam, without ſaying, Et eorum alteri; ſo as it was joynt, and not ſeverall, and Wray at the time of the triall, was at the Parliment at London, and ſo the Cauſe was tried before Periam only, and therefore coram non Judice. At another day, The Caſe was argued by the Barons of the Exchequer. And Clark Baron, conceived that the Plaintiff ought to recover, and he ſaid, That upon the eſcape, the Common Law gave an Action upon the Caſe againſt the Sheriff; and the reaſon why the

Sheriff

Sheriff ſhall be charged, is, that one cannot be in Execution but once; and then if the Sheriff ſhould not be charged, the party Plaintiff ſhould by negligence of the Sheriff loſe his Suit, and alſo his Debt: And admit that a Capias doth not lie in the Caſe, yet the Execution by force thereof is not voyd, but voydable onely; and Error may be aſſigned as well in the Execution, as in the Judgment; which ſee 17 Aſſ. 24. where the Recognizor in a Statute Merchant alened the Land, and afterwards the Conuſee ſued forth Execution, ſo as the Land was extended, ſuppoſing the payment, i. Solvend. 14 E. 3. whereas in truth it was 16 E. 3. and the Feoffee brought a Writ of Error thereupon, and it was allowed; but the Sheriff ſhall not take advantage of the ſame: And truly the common courſe is, That a Capias lieth upon a Recognizance: and 7 H. 4. 101. upon a Recognizance acknowledged for the Peace, a Capias lieth for the King: and a Recognizance is but an Obligation of Record; and wherefore ſhould not a Capias lie thereupon, as well as upon a Suit brought upon an Obligation? The Statute of Weſt. 2. cap. 45. Si recens fit Cognitio ſtatim habeat Querens Breve de Executione illius Recognitionis: and the Statute doth not ſpeak in certain what manner of Writ, or what manner of Execution, therefore we ought to reſort to the Common Law for it, and that is a Capias. Gent, Baron, argued and agreed in every point with Baron Clark.

Manwood, chief Baron, argued, That the Plaintiff ſhould recover; and he put the Caſe of Recognizance: The Plaintiff ſueth two Scire facias, upon which two Nichels are returned; and afterward Levari facias, and upon that alſo Nihil is returned, and then iſſueth a Capias ad ſatisfaciendum for to take the ſaid Francis Woodhouſe, who then was in Priſon for Felony, upon which Capias the Sheriff did arreſt him, and he being afterwards convicted of Felony, eſcaped; upon this matter Debt is brought againſt the Sheriff. A Recognizance taken in the Chancery is a thing upon Record in a Court of Record, an Obligation of Record, and a Debt upon Record. It hath been objected, where no Capias lieth in the Proces upon the Original, there no Capias lieth upon the Execution: but it is good to examine the Reaſon thereof, for Lex plus laudatur quando ratione probatur: The Capias upon a Recognizance is not by 25 E. 3. but by the common Law: for here is a Debt upon Record, wherefore ſhall not his body be ſubject to it, as well as in the caſe of a Debt upon a bare Obligation? I do admit the Rule, That where there is no Capias ad reſpondendum, there is no Capias ad ſatisfaciendum, but that ought to be intended in caſes where there is an Original, and Meſn Proces before Judgment; but here is no Original, no Meſn Proces before Judgment, ergo, our Caſe is not within the ſame Rule: But I will put a good Rule; It is Debt upon Record, ergo a Capias lieth: In the Kings Bench, If the Defendant comes in by Latitat, if the cauſe whereof the Action is brought be of importance, he is to put in ſpecial Bayl; and thoſe who bayl him ſhall be bounden in a Recognizance, &c. The Defendant is condemned in the Action: Now if the Defendant cannot be found, ſo as Execution may be ſued forth againſt him, then a Scire facias ſhall iſſue forth againſt the Sureties which bayled him, and upon that a Capias, and that is very frequent there in uſe: So alſo is the courſe of the Court of Common Pleas; ergo it ſhall be ſo in the Chancery in caſe of a Recognizance. If one be taken in Execution upon a Statute Staple, and ſueth an Audita Querela upon a Releaſe, or other matter, and be bound with Sureties in the double value, &c. to the King, and to the party; If he be condemned in the Audita Querela, &c. and cannot be found, a Scire facias ſhall iſſue forth againſt the Sureties, and thereupon a Capias. And this queſtion, If the Capias in this caſe lieth, or not? is to diſpute either by Audita Querela in the Chancery, or by Error in the Kings Bench: for the ſaid Courts have authority to affirm the proceedings,

or

or to diſaffirm them. And here the Queſtion was, If Woodhouſe were impriſoned or no? and not, if the Capias erronice emanavit or not? And he took a difference where Proces is awarded out of a Court which hath not authority of the principal cauſe; there it is coram non judice, and the Proces is voyd; and if the Sheriff taketh the party by force of ſuch Proces, it is meerly voyd, and he a Treſpaſſor; but contrary if the Court hath authority of the principal cauſe, there if the Proces be miſconceived, it is onely erroneous. An unskilful man in Chancery makes an Appeal of Murder, returnable in the Common Pleas; and there an unskilful Clark makes a Capias upon it, the ſame is coram non judice, and not altogether voyd: But if in a Writ of Entry, in the nature of an Aſſiſe, the Demandant hath Judgment to recover Debt and Damages, and thereupon iſſueth a Capias, the ſame is not voyd, for it is but a miſawarding of the Proces, & improvide emanavit. If out of the Common Pleas immediately a Writ iſſueth to the Sheriff of Cheſter, which is a County Palatine, where the Kings Writ doth not run, the ſame is voyd, and falſe impriſonment lieth upon ſuch a taking. A Formedon brought in the Kings Bench, and upon that a Capias, is voyd, & coram non judice; and the Sheriff is bound to take notice of the Law in ſuch caſes, that thoſe of the Kings Bench have not authority to hold plea in real Actions. As to that, That Woodhouſe was convict of Felony, the ſame ſhall not avoyd the Execution; but I grant, that the King ſhall be ſatisfied before the ſubject, &c. And he relied much upon the ſaid Caſe cited before, 13 E. 3. Bar 253. as to the matter of the Capias: 19 H. 6. In Eſcape the Defendant pleaded a Releaſe of him who recovered to the Priſoner being in Execution, and it was holden no Plea. And in the principal Caſe Judgment was given for the Plaintiff.

Mic. 29 *Eliz.* In the Exchequer.

CXIII. Bridget Clarks *Caſe.*

THe Caſe was, Clark was indebted to Archdel by Obligation, and afterwards delivered to Andrews certain Hogſheads of Wine to ſatisfie the ſaid Archdel the ſaid Debt: and afterwards the Obligation of Clark is aſſigned to the Queen for the Debt of Archdel: And if the property of the ſaid Hogſheads of Wine were altered by the delivery of them to Andrews before the Aſſignment? was the Queſtion. Egerton, Sollicitor, The property is not altered, for the Baylor might have an Action of Account againſt Andrews before that he hath delivered the ſame over according to the Baylment: but if he hath delivered them over, the ſame is a good bar in an Account: But if one be accountable to me upon a Baylment, and afterwards I do require him to deliver the Goods over to A. the ſame is not in bar of Account, but is good in diſcharge of account before Auditors; for the ſame is matter after the Baylment, not upon the Baylment. If Goods be bayled to bayl over upon a conſideration precedent of his part to whom they ought to be bayled, the Baylor cannot countermand it; otherwiſe it is, where it is voluntary and without conſideration; but where it is in conſideration of a Debt not countermandable, contrary, if it be to ſatisfie the Debt of another. Manwood, Where the Debtor of the King is ſufficient, there a Debt due to him ought not to be aſſigned to the King, but onely where the Debt of the King is doubtful, and that was the ancient courſe; but now at this day multi videntur & habentur divites, qui tamen non ſunt; and therefore omnis Ratio tentanda eſt, for the Recovery of the Kings Debts. But as to the Caſe before us; The Wife is Executrix to her Husband, who was indebted to Archdel, and ſhe delivers the Goods to Andrews to ſatisfie Archdel, and all that is before the Aſſignment: And I am of Opinion, That the property of the ſaid Goods is altered; for, as the caſe is, Andrews was

Surety for Clark, and hath a Counter-Bond of Clark to ſave him harmleſs: If I borrow 100 l. and deliver unto the Lender Plate for the ſecurity of it, the property general of it is in me, yet the Bailee hath a ſpecial intereſt in it, until he be payd. If Goods be delivered to A. to pay unto B. A. may ſell them. An Executor hath Goods of the Teſtators, and he with his own Monies payeth the Debts of the Teſtator, he ſhall retain the Goods, and the property is altered. And here in our caſe, Andrews may by vertue of this Bailment ſell the Goods, and with the Monies ariſing thereof pay the ſaid Archdel. And afterwards Judgment was given accordingly, that the property of the Goods by the delivery over by Andrews was altered.

Mic. 29 *Eliz.* In the Exchequer.

CXIV. Foskews *Caſe.*

FRancis Foskew, ſeiſed of the Manor of Foskew in his Demeſn as of fee, in conſideration of a Marriage to be had with Francis his Son with M. Daughter of Sir Edw: Huddleſton, 9 Feb. 25 Feb. covenanted to levy a Fine of the Manor aforeſaid; and that the ſaid Fine ſhould be to the uſe of himſelf and his Wife for their lives, and after their deaths to the uſe of the ſaid Francis their Son, and M. and the Heirs of their bodies begotten, with remainders over: The Fine was levyed accordingly: afterwards, 19 Octob. 27 Eliz. Francis the Father acknowledged a Recognizance to the Queen, and dyed, his Wife dyed; and now this Manor is extended for the Debt to the Queen by force of the Statute of 33 H. 8. And now Coke came into Court, and prayed that the ſaid Manor might be diſcharged of the Debt to the Queen, becauſe it is not chargeable by the ſaid Statute; the words of which Statute are, All Mannors, Lands, Tenements, &c. which hereafter ſhall deſcend, remain, or revert in Fee-ſimple, tayl general or ſpecial, by, from, or after the death of any his or their Anceſtor or Anceſtors as Heir, or by Gift of his Anceſtor whoſe Heir he is; which ſaid Anceſtor or Anceſtors was, is, or ſhall be indebted to the King, or any other perſon or perſons to his uſe, by Judgment, Recognizance, Obligation, &c. In every ſuch caſe, the ſaid Mannors, &c. ſhall be charged, &c. This Statute was made for the benefit of the King in two points: 1. To make Lands entayled liable to the King againſt the iſſue in tayl for the Kings Debts in the caſes aforeſaid, where they were not liable. 2. To make Bonds taken by the Officers of the King to the uſe of the King, as alſo of Statutes. We cannot deny but that we have Lands of the Conuſor, and of the Gift of the Conuſor our Anceſtor, whoſe Heir we are, who was indebted to the Queen, and yet we are not within this Statute: Was or ſhall be indebted, ſhall not be intended after the Gift made; for if he firſt convey his Land, and afterwards becomes indebted, the ſame is not within the Statute: and where a miſchief is to be remedyed by a Statute, the remedy in expoſition of the Statute is to be applyed according as the miſchief doth require: [Shall be] is to be intended of future Debts after the Statute: and in our caſe, the Father was not Receivor, or other Officer to the Queen: And if this Statute ſhould be ſo conſtrued, the Father might take 10000 l. for the Marriage of his ſon, and aſſurance of Lands unto him; and then if he will acknowledg a Debt of the Queen, he ſhould defeat the whole, which ſhould be a very great miſchief: The words are, [By Gift after the Debt acknowledged to the Queen.] And he cited the Caſe, 19 Elizab. Plow. 191. betwixt Ludford and Gretton, upon the Statute of 18 H. 6. the words of which are, [That whatſoever Warrant hereafter to the Chancellor of England addreſſed, the day of the delivery of the ſame it be entered of Record in the Chancery; and that the Chancellor make Letters Patents upon the

the ſame Warrants, bearing date the day of the ſaid delivery in the Chancery, and not before: and all Letters Patents made to the contrary ſhall be voyd.] And the Caſe was, That a Warrant was directed to the Chancellor, for the making of Letters Patents, and delivered to him before the making of them, but the day of the delivery was not entered of Record, &c. And it was holden, that notwithſtanding that, the Letters Patents were good; for the miſchief at the common Law intended to be reformed by that Act, was not the poſt-dating of the Letters Patents, but the ante-dating, and therefore that ought to be principally taken into conſideration: which miſchief being underſtood, the words of the ſaid Statute are to be applyed to it; ipſæ etenim Leges cupiunt, ut jure regantur; i. with an Equity according to the Miſchief, and not always according to the preciſe words: and in that caſe it is ſufficient if the Letters Patents bear date after, and not before the delivery of the Warrant, and that was the matter intended to be reformed. Alſo, as our Caſe here is, We are not within this Statute; for the words are, Of the Gift of his Anceſtor, but here the Son hath not the Lands of the Gift of his Anceſtor, but rather by the Statute of Uſes, and ſo he is in the Poſt, and not in the Per, by his Anceſtor; for here the Fine was levyed to divers perſons unto the Uſes aforeſaid: and here the Gift was not a meer gratuity to his Son, but in conſideration that he ſhould marry the Daughter of Sir Edm: Huddleſton; and alſo the Father was the Kings Debtor after the Gift, and not before.

Poham, Attorny General, to the contrary: The letter of the Statute is with us, for he comes in of the Gift of his Anceſtor, who was indebted to the Queen: and although that the Gift was by way of uſe, yet the preſidents in the Common Pleas and other Courts are, That he may declare, Of the Feoffment of ſuch a one, although it was by way of uſe: and he ſaid, If A. be bound to enfeoff B. of ſuch Lands, if he maketh a Feoffment to the uſe of B. and his Heirs, he hath well enough performed the Condition: and if the Caſe ſhould not be within the Statute, then ſhould that branch of the Statute be idle, and to no purpoſe: For if the Anceſtor be ſeiſed, and becometh indebted to the Queen, and after makes a Conveyance ut ſupra, the ſame is provided for by the firſt branch of the Statute: For the Land is liable to the Recognizance or Obligation made to the King, and that they ſhall be as effectuall as a Statute Staple; and reaſon requires, that the ſon, who comes in by meer gratuity of his Anceſtor, ſhould be charged: And it was a common practice before the making of that Statute, That the Kings Officers would convey their lands to their children, and then become the Kings Debtors; for the remedy of which miſchief, the Statute was made, and the Statute of 27 Eliz. doth not reſpect the Heir, becauſe he is Heir, but as a purchaſor onely, and that upon good conſideration: Coke, If any fraud can be found in our Caſe, then without doubt we ſhould be within the Statute, but being upon good conſideration, it is out of the Statute; nor was there any purpoſe in the father when he made the ſaid Conveyance, to become the Kings Debtor, or Officer to him, for if there were, then he is within the Statute, alſo the gift had been a meer gratuity, &c. And afterwards, at another day, the Caſe was moved by Coke, and he ſaid, That here is not any gift, becauſe it was in conſideration of Marriage, and then no gift, for it is an old Proverb, What is freer then gift? Egerton, The father giveth to his ſon and heir, the ſame is within the Statute, and yet here is conſideration, (ſcil.) of blood; Coke contrary, Where the father giveth to his younger ſon, or to his daughter, which is not his heir; and of that opinion was Manwood, chief Baron: And afterwards, (as Coke reported) the ſon and his lands were diſcharged.

Mich. 26 *Eliz.* In the Kings Bench. *Error.*

CXV. Amner *and* Luddingtons *Case.*

ERror was brought in the Kings Bench by Amner against Luddington, Mich. 25 and 26 Eliz. Rot. 495. The Case was, That one Weldon was seised, and Leased unto Pierpoint for ninety nine years, who devised the same by his Will in this manner; I bequeath to my Wife the Lease of my House during her life, and after her death I will it go amongst my Children unpreferred. Pierpoint dyed, his Wife entered, and was possessed virtute legationis prædict. and took Husband one Fulshurst, against whom one Beswick recovered in an Action of Debt 140 l. upon which recovery issued forth a Scire facias, and upon that a Venditioni Exponas, upon which the Sheriff sold the said term so devised to one Reynolds: Fulshurst dyed, his Executor brought Error to reverse the Judgment given against the Testator at the Suit of Beswick; the Wife did re-enter, and sold the Land, and dyed; Alice, an unpreferred Daughter of Pierpoint, did enter, and upon that matter found by special Verdict in the Common Pleas, the Entry of Alice was adjudged lawful: upon which Judgment Error was brought in the Kings Bench: and it was argued upon the words of the Devise, because here the House is not devised, but the Lease it self, (scil.) all his interest in the thing devised: And it is not like unto the Case betwixt Welchden and Elkington, 20 Eliz. Plow. 519. where the Case was, That Davis being Lessee for years, devised that his Wife should have and occupy the Land demised for so many years as she should live; nor unto the Case of Paramour and Yardley, 21 Eliz. Plow. 539. for there the Lessee devised, That his Wife should have the occupation and profits of the Lands until the full age of his Son: For in these two Cases the Land it self is quodam modo devised, but in our Case all the Estate is devised, *i.* the Lease it self. And also in those two Cases a certain person is assigned and named in the Will, who should take the residue of the term which should be expired after the death of the Wife: But in the Case at Bar, there is not any person certain appointed, &c. but the Devise, as to that, is conceived in general words, to Children unpreferred; therefore neither any possibility, nor Remainder in any person certain, therefore all the term is wholy in the Wife, and then she might well dispose the whole. But all the Court was to the contrary, and that in this case the possibility should rise well enough to the death of the Wife, to that Daughter unpreferred. Another matter was moved, If the said term, being sold in the possession of the Wife of the Devisor by force of the Execution aforesaid; If now, the Judgment being reversed, the sale of the term be also avoyded? for now the party is to be restored to all that which he had lost. And it was argued by Coke, That notwithstanding the Reversal of the Judgment, the sale did stand good; for the Judgment for the Plaintiff in a Writ of Error, is, That he shall be restored to all that which he hath lost Ratione judicii prædict. and the Judgment was, That the Plaintiff should recover 140 l. and therefore by the Judgment in the Writ of Error he shall be restored to so much, but the mean act, (scil.) the sale of the Lease, shall stand, and shall not be defeated, or avoyded. As 7 H. 6. 42. A Statute Staple is bayled in Ouster le main, the Conusee brings Detinue against the Baylee, and hath Judgment, and recovers the Statute, and upon that hath Execution: The Baylee brings a Writ of Error, and reverseth the Judgment given the Detinue, yet the Execution shall stand, and Audita Querela doth not lie for the Conusor: And see 13 E. 3. t. Bar 253. Accountant found in Arrearages,

rearages, commited to the next Goal, eſcapes, and reverſeth the Judgement given againſt him in accompt, by an Ex parte talis, yet the Action upon the eſcape lieth; and the Court, as to that point, all agreed; but that point did not fall in Judgement; for by the ſale nothing ſhall paſſe, but the Intereſt in præſenti, which was in the wife of the Deviſor; but the poſſibility to the children unpreferred, was not touched thereby; And afterwards, the Judgement was affirmed.

Mich. 36 *Eliz.* In the Exchequer.

CXVI. Edwards *and* Halinders *Caſe.*

RIce Edwards brought an Action upon the Caſe againſt Halinder, and declared, That whereas one Baniſter, had demiſed unto the Plaintiff a Celler, to have from week to week, Quandiu ambabus partibus placuerit; And alſo whereas the ſaid Baniſter had Leaſed to the Defendant a Shop, directly over the ſaid Celler, there the Defendant had laid ſo great a burden upon the floor of the ſaid Shop, that thereby the ſaid floor fell down, and brake certain veſſels of the Plaintiffs full of Wine, by reaſon whereof the Plaintiff loſt his Wine, to the value of, &c. to his damages, &c. The Defendant ſaid, That before the charging of the floor, ut ſupra, The ſaid floor had ſuſtained greater weight; and further, that the ſaid Baniſter let unto him the ſaid Shop, for to lay there the weight of 30 Tun, and he had laid there but the weight of 12 Tun; and alſo that the walls of the ſaid Celler were ſo weak, that the floor of the ſaid Shop fell by reaſon thereof; Upon which, there was a Demurrer in Law. It was argued by Godfrey for the Plaintiff; Where injury or wrong is done unto any, the Law gives remedy to the party grieved; and although that the Shop was let unto him to lay wares there, which he hath done, and that it was not his intent to ſurcharge the ſaid Warehouſe, although the event be contrary, yet for as much as by the laying of wares there, a wrong and damage follows to the Plaintiff, the Defendant ſhall be puniſhed; for the rule is, Sic utere tuo, ut alienum non lædas: If I have a houſe, and another buildeth ſo high over me, that rain-water deſcends and falls from his houſe upon my houſe; an action upon the Caſe lieth, See F. N. B. 184. So if by his building he ſtops my light, as it was lately adjudged in the Kings Bench, in the Caſe betwixt Bland and Moſeley: See 6 E. 4. 7. & 8. Damages recovered for a wrong done againſt the will of the party: and ſee other caſes upon this Learning, 13 H. 4. t. Action upon the Caſe: 48. The Plaintiff had ſold certain truſſes of Hay to the Defendant, within ſuch a Meadow, to be carried away from the ſaid Meadow within a certain time; but the Defendant let the Hay lie there without carrying the ſame away, ſo it putrified the Meadow, by reaſon whereof the Plaintiff loſt the profit of his Meadow for a great time; and thereupon brought an Action of the Caſe againſt the Defendant, and the Action was adjudged maintainable: See 22 E. 4. 8. where the owners of the Plough in turning of the Plough, according to the cuſtom in the common fields upon the land of another; one of the Plough cattel, againſt the will of the driver, takes a mouthfull of graſſe, the ſame is juſtifiable, but if the driver of the cattel ſuffereth the ſame to continue, an Action will lie againſt him: So 22 E. 4. 49 Where I am bound to encloſe my land againſt another, and in default of encloſure, the cattel of the other eſcaped into my land and cloſe, I ſhall not puniſh him, but if he after notice, doth ſuffer them to continue there, he ſhall be puniſhed, although it be through my default: Alſo it is alledged in our Declaration, That the Defendant intending to hurt and ſpoil the Plaintiffs Wines, did lay ſuch a weight, &c.

See the Caſe Reported in *Popham's* Reports very ſhort, but not with the Arguments.

And

And the Defendant anſwers thereunto. That the floor fell in default of repairing of the walls of the Celler, or for the ruinouſneſſe of them, where he ought to have pleaded further, Abſque hoc, that the Shop was ſurcharged with the intent to hurt the Plaintiffs Wines; In an Action upon the Caſe, upon a Trover, The Defendant pleads, that the goods whereof, &c. were pawned unto him for the ſecurity of certain money not yet paid, The ſame is no plea, without ſaying further, Abſque hoc, that he did convert, &c. See 43 E. 3. 33. In an Action brought againſt a Smith, for his negligence in curing of a Horſe which he took upon him to cure; the Defendant was driven to traverſe, Abſque hoc, that the Horſe periſhed in default of his care: Dalton contrary, Where in doing of a lawfull Act, by a miſhap a damage cometh to another, againſt the will of the doer, no puniſhment ſhall follow: See the Caſe cited by the other ſide in 6 E. 4. 7. & 8. If he might have done more then he had done to have prevented the miſchief, he ſhould be puniſhed; but if he could not have done more then he hath done, or otherwiſe then he hath done to prevent it, he is diſpuniſhable, and he may, Uti jure ſuo, although it be to the prejudice of another: See 12 H. 8. 2. & 3. Harcourts Caſe; If I cannot otherwiſe let the water out of my land, I may juſtifie the letting of it in your land which is adjoyning, although that your land be drowned thereby: Sometimes ignorance of the party ſhall excuſe the offence: As if my Dog worry your ſheep, if I do not know of ſuch ill quality in him, I ſhall not be puniſhed for the ſame. And it doth not appear that the Defendant had notice of the ruinouſneſſe of the walls, although now it appeareth that they were ruinous, and for that cauſe the floor fell; for the Defendant ſaid, That the walls were ruinous, in occultis, & abſconditis partibus ipſorum; And here needs not any Traverſe: For it is confeſſed, That the floor of the Shop was ſurcharged, but the ſame is avoided and excuſed, becauſe that the walls were ruinous, in occultis & abſconditis ipſorum partibus; And for as much as our Land-lord (who is alſo the Land-lord of the Plaintiff, hath let to us the Shop, to lay there the weight of 30 Tun, ſo as the Defendant hath good right, as to ſuch weight againſt the Leſſor of the Plaintiff, and all others, claiming under him. And here the Plaintiff hath declared of a Leaſe from week to week, Quamdiu ambabus partibus placuerit, and hath not averred the continuance of his Leaſe, &c. Godfrey, A Leaſe is made from year to year, ut ſupra, &c. The Leſſor brings Debt for the ſecond year, he need not to aver the continuance of the Leaſe; for when the ſecond year doth begin, the Leſſor cannot put him out that year; But we, upon the matter, have averred the continuance, for we have ſaid, Et ſic poſſeſſionatus exiſtens, &c. Manwood, The Declaration is, That the Defendant, Nequiter & malitioſe intendens, &c. tantum ponderis, was laid upon the floor, Ita quod vi ponderis dirupta fuit contabulatio: And the Plea of the Defendant is, Quod muri in partibus occultis & abſconditis ruinoſi fuerunt, &c. & ideo corruerunt. So as the Plaintiff ſpeaks of the floor, and the Defendant of the walls, and ſo the Defendant doth not anſwer the Plaintiff; for the Shop-man ought not to go into the Celler, nor the Celler-man into the walls. But Dalton ſaid, That the Plea was, Quod diruptio & fractio contabulationis fuit ex eo quod muri ruinoſi fuerunt in partibus occultis & abſconditis. At another day, it was argued by Flemming for the Plaintiff, A voluntary and unlawfull act is laid to the charge of the Defendant, who pleads ſpeciall matter to excuſe himſelf, but doth not anſwer the point of the Action, but onely that the fall was ſudden, Et quia muri fuerant ruinoſi in partibus occultis, &c. whereas we have declared, that the weight was the cauſe thereof: 3 H. 6. Double Plea 31. In an Action upon the Caſe: for negligent keeping of fire, the houſe of the Plaintiff was burnt, he ought to take a Traverſe, without that, that it was burnt by the ill keeping of the fire of the Defendant; And he needs not to aver the continuance of

the

the Tenancy at will : 38 H. 6. 27. A Leſſee for life aſſignes his Eſtate to B. who Leaſes at will to C. B. is diſſeiſed by D. and C. ouſted, C. reenters, and brings Treſpaſſe, he muſt aver the life of A. but not of B. nor the continuance of the will. Atkinſon contrary; I conceive there needs no Traverſe, for the matter of the Declaration is expreſly confeſſed, and avoided, 5 H. 7. 12. 13. where one makes Title to common, or Rent by preſcription, if the other pleadeth unity of poſſeſſion, he needs not traverſe; ſo where he claims B. for his Villain, &c. B. ſaith, that he is a Baſtard, there needs no Traverſe. We have confeſſed in pleading. Quod gravitate ponderis, the floor fell down; but we ſay farther, that the cauſe was, becauſe the walls were ruinous, &c. and here is matter in Law; Who ought to repair them: The Leaſe was made unto the Defendant, 29 Julii, and the floor fell 30 Julii, the day following; and if by Law the Defendant ought to repair them: it was impoſſible for him to do it, and that ſhall excuſe him: If one hath a Shop, and another a Celler under it, and the Shop minatur ruinam, there is a Writ in the Regiſter, De reparatione facienda. 153, &c. And it lieth againſt him who ought to repair by preſcription, or by the Law. And we who are the Leſſee, are not bound to repair; for if the ground Timber be in decay, and ſo the houſe ruinous at the time of the Leaſe, it is a good Plea in an Action of Waſte, if the houſe fall in ſuch deſect; for the Leſſee is not bound to ſuch reparation, (ſcil.) for great timber, which was rotten at the time of the Leaſe. But if after the Leaſe it becomes rotten for want of covering, it is otherwiſe, See 12 H. 8. 1. And here the Plaintiff hath remedy againſt his Leſſor, for he is bound to the reparations by the Law, and not the Leſſee; And as he may have the ſaid Writ, De reparatione facienda, before the miſchief, ſo he may now have after the miſchief: and therefore no Law binds the Defendant to repair; Nor is there any Cuſtom pleaded to that purpoſe: and alſo for as much as the occaſion of the Cauſe of action was the ruinouſneſs of the walls, the Defendant ſhall not be charged with the ſame: And alſo he ſhall not be charged with a thing he could not prevent. Manwood, The Defendant hath pleaded, that the fall of the floor was, eo quod, the walls were ruinous in partibus occultis, which was a ſecret thing, and unknown unto the Defendant, upon which the Plaintiff hath demurred, and ſo confeſſed the plea of the Defendant to be true, and that he was ignorant of the feebleneſſe of the walls, and therefore he needs not any Traverſe. And here the Defendant hath pleaded, That the Shop was demiſed to him for greater carriage. Gent, Baron, was of opinion, That the Defendant hath not fully anſwered to the Declaration, for he is charged with the laying of ſo much weight upon the floor there, ſo as, viponderis, it fell down, To which the Defendant hath ſaid, That the walls were ruinous, in occultis partibus; and doth not anſwer to the ſurcharging, (ſcil.) Abſque hoc, that he did ſurcharge it: Clark, Baron, It is a generall Rule, That every materiall thing alledged in the pleading, ought to be traverſed, confeſſed and avoided, which the Defendant hath not done here, but he would excuſe himſelf through the default of another, and anſwer nothing to that with which he himſelf is charged; And afterwards Judgement was given in the Court of Exchequer for the Plaintiff. Whereupon, afterwards, the Defendant brought a Writ of Error in the Exchequer Chamber, where the Caſe was argued again, But there, the Judgement given in the Court of Exchequer was affirmed. See this Caſe reported short, in Popham's Reports lately published.

Trin.

Trin. 31 *Eliz.* In the Common Pleas.

CXVII. Linacre *and* Rhodes *Caſe.*

THe Caſe was, That Linacre was bound in a Statute; and his body taken in Execution, and the Sheriff voluntarily ſet him at large, and afterwards the Conuſee ſued Execution of the lands of the Conuſor; who thereupon brought an Audita Querela. It was moved by Yelverton, Serjeant, That by that voluntary diſcharge of him by the Sheriff, the whole Execution was diſcharged, for the Execution is entire: See 15 E. 4. 5. Where the Conuſee in a Statute Perchant, hath the body and lands of the Conuſor in Execution, and afterwards the Conuſee ſurrendreth his Eſtate which he hath by Extent; now the Execution of his body is diſcharged, and the Conuſor ſhall have a Scire facias, or Audita Querela to diſcharge his body: So if three Conuſors be in Execution, and the Conuſee doth diſcharge one of them, the ſame is a diſcharge of them all, and in the principall Caſe, the body is the principall, and therefore the diſcharge of the principall part of the Execution is the diſcharge of the whole. Hammon, Where the Conuſee himſelf diſchargeth the Execution in part, it is good for the whole, but where diſcharged by the Sheriff, Nihil operatur: Anderſon, If the Conuſor dieth in Execution, yet the Conuſee ſhall have Execution againſt his Heir of his land, for the having of the body in Execution, is not any ſatisfaction to the party; for his body is but a pledge untill the money be payd; and there is no reaſon, that the act of the Sheriff ſhould diſcharge the Execution. Windham, to the ſame intent; And if the Conuſee ſueth Execution, and hath the body of the Conuſor in Execution this day, he may the next day ſue Execution of the lands, and the next day after, of the goods; and if the Conuſee doth diſcharge the body, the whole Execution is diſcharged, and it is true, That if A. recovereth againſt B. in an Action of Debt, and B. is taken by a Capias ad ſatisfaciendum, and afterwards the Sheriff permitteth B. voluntarily to eſcape, here B. is diſcharged, although it be not the act of the party; for there the Plaintiff had a full Execution, which is not here; for in Caſe of Execution upon a Statute-Perchant, the Execution by the body is not the full Execution, and therefore, although the Sheriff hath diſcharged the body, yet the Conuſee may have Execution of the goods and lands, but not of the body; and afterwards Judgement was given againſt the Plaintiff; That the Audita Querela did not lie, and that Execution might be ſued of the goods and lands but not of the body.

Trin. 32 *Eliz.* In the Common Pleas.

CXVIII. Webbe *and* Mainards *Caſe.*

IN Ejectione firmæ, The Caſe was, Walter Goldſmith, ſeiſed of certain lands, made a Feoffment to the uſe of himſelf for life, and after to the uſe of John his eldeſt ſon in Fee; Proviſo, That after his death, his ſaid ſon ſhall pay unto his younger ſon, William, 30*l.* by 3*l.* per ann. at the Feaſt of St. Michael untill the entire ſumme be paid, and if he fail of payment, then to the uſe of the ſaid William and his heirs; Will. Goldſmith the Feoffor dieth, the money is not paid, but afterwards the ſaid younger ſon makes an Acquittance, and thereby acknowledgeth the Receit of the ſaid money, according to the Proviſo, John dieth; Now, if the younger ſon may

enter?

enter? And firſt, if the younger ſon be concluded by that Acquittance, to ſay that the 30 l. was not paid? And if he be not concluded, Then if becauſe that the words, are but words of limitation, the younger brother hath Title of Entry? and then, if this Entry be bound by the deſcent from John to his Heir? or if John by continuance of the poſſeſſion, after the breach of the Proviſo, be a Diſſeiſor, or not? were Queſtions propounded to the Court, which the Court took time to conſider of; yet it was then ſaid, That the uſe was ſetled in William, and the poſſeſſion executed unto it, but not ſuch a poſſeſſion upon which an Aſſiſe or Treſpaſſe lieth.

Hill. 31 *Eliz.* In the Kings Bench. *Rot.* 647.

CXIX. Willis *and* Jermines *Caſe.*

Cro. Eliz. 167.

IN Ejectione firmæ, It was found by ſpeciall Verdict, That the Dean and Chapter of Exeter Leaſed the Land, where, &c. to Jermine, rendering Rent to be paid at their Chapter-houſe at Exeter, and for default of paiment, that ſuch Leaſe ſhall be void and ceaſe; and that the ſaid Jermine conveyed his intereſt to the Defendant, and afterward the Rent was demanded at the Chapter-houſe, but not paid; and afterwards, The Dean and Chapter, by the name of Dean and Chapter of St. Mary of Exeter, (where they are incorporate by the name of Dean and Chapter of St. Mary in Exeter,) make an Indenture of Leaſe for fourty years, in their Chapter-houſe to Willis, and thereunto put their ſeal in the Chapter-houſe, and made a Letter of Attorney to another to enter, and to make livery of the ſaid Deed, which was done accordingly: It was moved by Harris, Serjeant, That this Leaſe made in manner, &c. is not good, for the Corporation is miſnamed, i. of Exeter, for in Exeter, but the Court diſallowed that Exception; for there is not any materiall variance, and ſo it was ſaid, it hath been ruled. And he ſaid, that for another cauſe the Leaſe is not good; for when the Dean and Chapter in their Chapter-houſe make this Indenture of Leaſe, and ſet their Chapter-ſeal to it, It was their Deed preſently, without other delivery: and then Jermine being in poſſeſſion at the time of the putting of the ſeal to it; they were out of poſſeſſion thereof, and ſo the new Leaſe void, becauſe they were not in poſſeſſion at the time of the making of it; for no delivery is neceſſary to the Deed of a Corporation; but the date of the ſealing of it, makes it a perfect Deed, and then the delivery of the ſame by the Attorney is of no effect. Wiat to the contrary, This Leaſe is good: For Jermine was but Tenant at ſufferance at the time of this Leaſe; but if Jermine had been a Diſſeiſor, then the delivery in the Chapter-houſe was void, and then the ſecond delivery upon the land good. And Harris agrees, That if Jermine be but Tenant at ſufferance, then the ſecond Leaſe made off the land was good enough. But it was agreed by the whole Court, That the Leaſe is good enough for the manner, and there is not other form or means for a Corporation to make a Leaſe then this here: And it was moved; That the firſt Leaſe was not utterly ceaſed without entry, and then the new Leaſe being made before entry is void; But Wray was cleer of a contrary opinion; and ſaid, That the Dean and Chapter might make ſuch a Leaſe before entry; But Gawdy, Juſtice, doubted of it, Vide 28 H. 8. 6. Dyer and Com. 2. and 3. Ph. and Ma. 132. Browning and Beſtons Caſe.

Harris, The Attorney hath not purſued his Authority, for his Warrant is to enter into the land in the name of the Corporation, and claim it to their uſe, and then to deliver the Leaſe made, upon the land; but the Jury have

not found ſuch matter, but have found onely that he came by vertue of the ſaid Letter of Attorney, and delivered the ſame upon the land, but do not finde that he entred, and claimed the ſame to the uſe of the ſaid Dean and Chapter, But the Court held the ſame good enough; for in a ſpeciall Verdict, every particular circumſtance need not to be found, as in pleading it ought to be; and becauſe it is found, That the Attorney, by vertue of the ſaid Warrant of Attorney, hath delivered the Deed upon the Land, he hath purſued his Warrant in all. Gawdy, Delivery of the Deed is as neceſſary in caſe of a Corporation, as it is in the caſe of other perſons.

Trin. 31 *Eliz. Rot.* 768. In the Kings Bench.

CXX. Rymerſly *and* Coopers *Caſe.*

IN an Action upon the Caſe, for ſlanderous words, the Plaintiff declared, That where, by the cuſtome of the city of London, it hath been uſed, If the Mayor, Recorder, or any Alderman, being a Juſtice of Peace there, might take the Depoſition of any perſon produced before them, or any of them to be depoſed in perpetuam rei memoriã ex parte alicujus perſonæ, which Depoſitions are there recorded, in perpetuam rei memoriam; and are good matter to be given in Evidence to any Jury, there to inform their conſciences of the truth of the thing in Queſtion, and declared further, That he himſelf was produced before one Bond, as a Witneſſe to teſtifie his knowledge in quadam cauſa ibid. ex parte Edw. Stapleton, before whom he depoſed, &c. The Defendant ſpake theſe words in ſcandall of the Plaintiff; Rymerſly was forſworn in the ſaid oath before, &c. The Defendant pleaded, That the Plaintiff made not any ſuch oath, and upon that the Plaintiff did demur in Law. George Crook, prayed Judgement for the Plaintiff, for the ſame is no plea; for the oath is but Conveyance; and therefore not traverſeable; for the ground of the Action is the ſpeaking of the words; and admit there were not any ſuch Oath taken by the Plaintiff, the offence of the Defendant was the greater, Nam peccavit in utroque, tam in juramento, quod nullum omnino fuit, quam in perjurio, quod ſine juramento eſſe non potuit; for if one ſaith, A. Murdravit J. S. whereas there never was any ſuch J. S. yet the Action lieth for the ſcandalous words: Alſo this Plea doth amount but to the generall iſſue, See 4 E. 6. Action, Sur le Caſe 113. 34 H. 6. 28. And as to the words, they are actionable; for (forſworn) amounts to perjured, being ſpoken upon an oath taken in a Court of Record, and ſo was it lately holden in the Caſe betwixt Brook and Doughtie: Godfrey, Contrary, The Declaration is not good, for the cuſtom in London is not well laid, or purſued; and therefore, upon the matter, it is but an oath taken before a private man; for he hath declared, That in the City of London, it hath been uſed, &c. but doth not ſay, That the City of London is Antiqua Civitas, as he ought, See the Caſe of the Prior of Lantony, 12 E. 4. 8. and 22 H. 6. Preſcription, 47. If a man alledgeth a cuſtom within a Town, he ought firſt preſcribe, That the ſaid Town is an ancient Town. Alſo it is not ſet forth in the Declaration: That Bond, at the time of the Depoſition taken, was a Juſtice of Peace in London, and then the cuſtom is not well purſued. But afterward, the Record was looked upon, and allowed to be good by the Court, and the Court conceived, That the Plea of the Defendant was good enough, as 13 E. 4. 8. In Debt againſt an Abbot, the Plaintiff counted upon a borrowing by the predeceſſor, &c. the Defendant pleaded, That he did not borrow, and it was holden a good Plea, and yet the Plaintiff in ſuch Caſe might plead the generall iſſue,

Brook and Doughties Caſe.

iſſue: See 26 H. 8. and 34 H. 6. Br. Action Sur le Caſe, 103 3 Ma. Dyer. 121. The Lord Mounteagles Caſe, 34 H. 6. 43. by Moile. In Trepaſſe, Quare ſervientem ſuum verberavit, &c. It is a good Plea, to ſay, That he was not the ſervant of the Plaintiff; and if in the principall, the Defendant plead, Not guilty, he ſhould thereby confeſſe, that the Plaintiff was ſworn. Wray, chief Juſtice, The Plea of the Defendant is good: And it was moved by Egerton, Solliciter generall, That the cuſtom to take Oath, as it is alledged, is not allowable, becauſe it is not a reaſonable cuſtom, that ſuch Depoſitions ſhould be taken, in perpetuam rei memoriam, If there be not a ſuit depending in the Cauſe; and becauſe that ſuch cuſtom not alledgable, it is not reaſonable, and then the Plaintiff ought not to have Judgement; and ſuch alſo was the opinion of Wray and Gawdy, Juſtices, But for the default in the Declaration, That it is not alledged, That London is antiqua civitas, Judgement was given againſt the Plaintiff.

Trin. 31 *Eliz. Rot.* 901. In the Kings Bench.

CXXI. Alexander *and* Dyers *Caſe*.

IN Debt for Rent reſerved upon a Leaſe for years, The Plaintiff declared, That he Leaſed to the Defendant 37 Sept. certain lands, to have and to hold from the Feaſt of St. Michael next enſuing, for a year, rendring 10 l. Rent, Virtute cujus, 29 Sept. the ſaid Leſſee entred, and enjoyed the ſaid land, from the Feaſt of St. Michael, all the ſaid year; and becauſe the Rent was behind, &c. And upon Nihil debet pleaded, it was found for the Plaintiff. It was moved in Arreſt of Judgement, that upon the Plaintiffs own ſhewing, here is no rent behind, and then no cauſe of Action; for it appeareth in the Declaration, that the Leſſee entred 29 Sept. which is before the Term begins; For the words of the Habendum are, From the Feaſt of St. Michael, therefore the Feaſt of St. Michael is no part of the Term, and then was the Defendant a Diſſeiſor, and the day after, the Term began, which cannot alter his Eſtate, but that he continueth a Diſſeiſor, and then he is not in by force of the ſaid Leaſe, and ſo no Rent can be due: Williams, As the Declaration is here, the ſame is not any Diſſeiſin; for the Plaintiff ſet forth in his Declaration, That the Leſſee, the Defendant, hath occupied the land demiſed, the whole year, and ſo hath not admitted any diſſeiſin, it being in his Election to make it a Diſſeiſin or not: Clench, Juſtice, Be it a Diſſeiſin or not; or be it that the Defendant entreth or not, he is to pay the Rent: Gawdy, The Leſſee is a Diſſeiſor, and continueth a Diſſeiſor, and yet Debt lieth againſt him for the Rent, by reaſon of the privity of Contract: which ſee Ryſdens Caſe 24 H. 8. Dyer, 5. And ſo in our Caſe, Quod fuit conceſſum per totam Curiam, and afterwards Judgment was for the Plaintiff.

Hill. 32 *Eliz.* In the Kings Bench. *Rot.* 561. *Error.*

CXXII. Monings *and* Worleys *Caſe*.

IN Debt upon an Obligation brought by Mary Worley, againſt Monings in the Common Pleas. The Condition was, That if Mary Worley the Plaintiff in the ſaid Action doth not depart out of the ſervice of the Defendant without licenſe of the Defendant Monings; nor marry her ſelf, but with his conſent, Then if the Defendant ſhall pay to the ſaid Mary within twenty eight days after demand by her made (of Monings) at his houſe at Walderſey, 100 l. That then, &c. And the Defendant in the ſaid Action

pleaded, That the ſaid Mary the Plaintiff, in the ſaid Action, 4 Maii, 30 Eliz. departed out of his ſervice without license, The Plaintiff, Mary, by Replication ſaid, That 6 Septemb. the ſame year ſhe departed out of his ſervice with license, and that 4 Octob. after, ſhe demanded the ſaid 100 l. at Walderſey aforeſaid, and he refuſed to pay it, Abſque hoc, that ſhe departed out of his ſervice 4 Maii, 30 Eliz. without license, and the Writ bare date, 18 of October, next after the demand; And it was found for the Plaintiff, and Judgement given for her in the Common Pleas; and now a Writ of Error is brought by Monings. Tanfield, The Judgment ought to be reverſed; for alwayes the Replication in ſuch Caſes, ought to contain ſufficient cauſe of action, and ſufficient breach of the Condition, or otherwiſe the Plaintiff ſhall not have Judgment, although that the iſſue be found for him: as 7 E. 4. 31. In Treſpaſſe for taking of goods, of A. and B. A. pleads, Not guilty, B. juſtifies, the Plaintiff makes Title to the goods by a gift, B. traverſeth the gift, and it is found for him againſt the Plaintiff, A. is found guilty: Now, although A. be found guilty, yet the Plaintiff ſhall not have Judgement againſt him; for it is found, that he hath not any Title to the goods. As in Debt upon a Bond againſt A. and B. A. pleads, Non eſt factum; B. pleads the releaſe of the Plaintiff, and it is found the Deed of A. and that the Plaintiff hath releaſed to B. the Plaintiff ſhall never have Judgement; for upon the Verdict, it appears, that he hath not cauſe of action: And here in the Replication, there is not a ſufficient breach ſhewed of the Condition; for although that Mary hath not departed from the ſervice of the ſaid Defendant, yet the ſame is not materiall; but the Defendant had twenty eight days after the demand, to pay the 100 l. but the ſame is not ſo here, for the Plaintiff hath prevented the Defendant; for the demand is alledged to be 4 Octob. and the Writ bears date, 18 Octob. the ſame year, and ſo the Defendant had not his time allowed him. Gawdy, The iſſue is taken upon the departure out of his ſervice, ſo as the demand is not now materiall, and therefore the alledging of the ſame is ſurpluſage, and ſhall not hurt: And the Defendant hath pleaded in Bar, the departure of the Plaintiff out of his ſervice, upon which he relieth, and the Demand ſet forth in the Replication, is not to be regarded, as to prejudice the Plaintiff: As 3 Ma. Dyer, 115. Leſſee for years, Covenants that he will not cut any trees, The Leſſor aſſignes the breach of the Covenant in ſuccidendo, twenty Oaks, The Leſſee pleads, that he did not cut the twenty trees, nor any of them; The Jury found, that the Defendant had cut down ten trees, The Plaintiff upon that Judgement, ſhall have Judgement, for the reſt is but ſurpluſage; and more put in iſſue then there needs to be. Fenner, It is not any full Plea, to ſay, That the Plaintiff did not depart out of the ſervice of the Defendant, 4 Maii, for if ſhe departeth at any other time, ſhe ſhall not recover, for which cauſe ſhe ought to have pleaded, That ſhe continued in his ſervice untill ſuch a day, and then ſhe departed with his license, and the inducement to the Traverſe ought to be ſufficient matter, otherwiſe it is not a full Plea, nor the Traverſe is not good. And if it be ſurpluſage, yet if it be not matter againſt her ſelf, it makes the Plea naught, which ſee 1 H. 7. 29. 6 H. 7. 16. Gawdy conceived, that the Judgement was well given, for the Defendant was at his liberty to plead the departure of the Plaintiff without his license, or to ſtand upon the demand. And now, although he pleads the departure, yet the demand is not confeſſed. And afterwards the Judgement given in the Court of Common Pleas was affirmed.

27 *Eliz.* In the Kings Bench.

CXXIII. Baſhpools *Caſe.*

THe Caſe was this, The Father ſeiſed of Lands, is bounden in an Obligation, and deviſeth his Lands to his Wife until his Son cometh to the age of twenty one years, the Remainder to the Son in Fee, and dyeth; and no other Lands deſcend or come to the Son from his Father. It was moved by Godfrey, That the Heir in that caſe at his Election might wave the Deviſe, and take by deſcent, or è contra: See 9 E. 4. 18. by Needham. But Gawdy and Shute, Juſtices, were of Opinion, That the Son ſhould be adjudged in by Deſcent: Clench contrary.

Trin. 30 *Eliz.* In the Kings Bench.

CXXIV. Bennet *and* Shortwrights *Caſe.*

THe Caſe was, The Defendant ſued the Plaintiff in the Spiritual Court for Tythes in kinde, and now the Plaintiff prayed a Prohibition, and ſuggeſted, That they had uſed in the ſaid Parith, time out of minde, &c. to take the tenth Sheaf in ſatisfaction of Tythe of Corn, &c. and that in thoſe years in which the Plaintiff had ſuppoſed the ſubſtraction of his Tythes, he had ſevered the tenth Sheaf from the nine parts, and the Parſon would not take them away: and that he had offered that matter by way of Plea in the Spiritual Court, but they there would not allow of it: And the Court was clear of Opinion, That the ſuggeſtion was good; for if the Parithioner ſetteth out his Tythes, and the Parſon will not take them, or if they be deſtroyed by Cattel by his Laches, he ſhall not have Tythes again: and therefore if the Eccleſiaſtical Court will not allow that Plea, it is reaſon that the party have a Prohibition, for after ſevetance tranſit decima in Catalla: But it was ſaid by the Court, That if the Parithioner doth ſet forth his Tythes, and takes them again, he may be ſued for Tythes in the Spiritual Court, and the ſetting forth ſhall not excuſe him.

Mic. 32 *Eliz.* In the Kings Bench.

CXXV. Walter *againſt* Pery *and* Springe.

WAlter brought a Scire facias againſt Pery and Springe, Sureties for one Brook upon Bayl in an Action of Debt: The Defendants pleaded the death of Brook before Judgment given againſt him: And all the Juſtices (except Wray) held, that the Plea was not good, for it is a ſurmiſe againſt the Judgment; for Judgment cannot be given againſt a dead man. Wray, The ſame is Error in fact, and of ſuch Error the party may have advantage in this Court. Gawdy, The Surety cannot take advantage of Error, nor plead it, for he is a ſtranger to the Record. Wray, He may plead, that the Defendant is dead after the Judgment, quod fuit conceſſum: but it was ruled, That the Defendants ſhould be ſworn that their Plea was true.

Mich. 32 *Eliz.* In the Kings Bench.

CXXVI. Alderſley *and* Duparries *Caſe*.

IN Debt upon an Obligation bearing date 4 Julii, 30 Eliz. The Defendant pleaded, that it was endorſed with condition to pay 50 l. before 15 Octob. 31 Eliz. and pleaded, that he had payd it before the 15 of Octob. aforeſaid, ſcil. the ninth of June, 30 Eliz. which is three weeks before the date of the Obligation, upon which the Action is brought: And they were at Iſſue, That the Defendant Non ſolvit before 15 Octob. &c. And the Jury have found, That the Defendant had not payd it before 15 Octob. and that matter was aſſigned for Error; for that Plea is contrary and repugnant in it ſelf, to alledg the payment before the date of the Obligation: But it was moved, That here the day of payment is not material, and but matter of ſurpluſage; for the Iſſue is, Whether the Defendant payd the Mony before the 15 day of October? and the Jury have found the Negative, ſo as the day in the Scilicet is not material, and the alledging of that is matter of ſurpluſage: As 20 H. 6. 15. Treſpaſs Quare clauſum fregit, & herbam conſumpſit, continuand. tranſgreſſ. from ſuch a day uſque ad diem impetrationis brevis prædict. Scilicet, 14 Feb. 17 H. 6. whereas the date of the Writ fuit 12 Octob. 17 H. 6. ſcil. the October before February: But it was not allowed; for the day of the Writ brought is certain enough, and the miſtaking in the Scilicet is not to any purpoſe. Wray, Payment before the day is not a good Plea, if he doth not ſhew the day and place. It was adjourned.

Trin. 31 *Eliz.* In B. R.

CXXVII. Parker *and* Burtons *Caſe*.

IN an Action upon the Caſe for ſlanderous words, (ſcil.) That the Plaintiff was perjured: the Defendant doth juſtifie, That whereas a Suit was proſecuted in the Exchequer Chamber at Weſtminſter betwixt the Defendant and another, and from thence a Commiſſion was awarded out of the ſaid Court to divers perſons, to examine certain Witneſſes at B. in Bark: and there, by vertue of the ſaid Commiſſion, the Plaintiff was depoſed, & falſe depoſuit, prætextu cujus, he ſpake the ſaid words. The Plaintiff replicando ſaith, De injuria ſua propria abſque tali cauſa: upon which Iſſue was joyned, and tryed in Berk: and found for the Plaintiff. And it was moved by Coke in Arreſt of Judgment, That the ſaid Iſſue ought not to be tryed in Berks onely, but by both Counties, Midd. and Berks; for all the matter of juſtification doth ariſe out of both Counties; the Suit and the Commiſſion which was in Midd. and the Execution of the Commiſſion and the Oath which were in Berks; all which matters is but one Caſe: as 2 H. 7. 3, and 4. Atkinſon, The Tryal is well for the manner, for the matter of the juſtification is the Perjury, and the Suit and Commiſſion are but inducion and conveyance to the Action: Alſo, the Defendant hath not ſhewed, that the Exchequer Chamber is in the County of Midd. as he ought: As where a man pleads a thing done in any Court, except in the Common Pleas, he ought to ſhew in what County the ſaid Court was at the time that ſuch thing was done, for Communia Placita teneantur in loco certo. Gawdy and Wray, When the Defendant doth juſtifie by reaſon of the Perjury, and the Plaintiff replies without ſuch cauſe,

cauſe, the ſame amounts to as much as if he had traverſed the Perjury, which being ſuppoſed to be committed there, ſhall be tryed there. Coke, It was the Caſe of one Loveday, 25 Eliz. In an Action upon the Caſe for ſlanderous words, the Defendant did juſtifie, by reaſon of a Robbery committed by the Plaintiff in another County; and the Plaintiff pleaded De ſon tort dem. ſans tiel Cauſe: the ſame ſhall be tryed by both Counties: See 2 H. 7. 3. Alſo it was moved, that here it is not ſhewed in what County the Exchequer Chamber is: Admit that it be in Berks, yet it ought to be tryed by both Counties, and that was Chelderlies caſe: And although it be not ſhewed in what County the Exchequer Chamber is, the Plaintiff had Judgment to recover, and the Tryal was held good enough.

Hill. 31 *Eliz.* In the Kings Bench.

CXXVIII. *Sir* Tho. Bacons *Caſe.*

A Writ was awarded out of the Court of Admiralty againſt Sir Thomas Bacon and Sir Thomas Heydon, to ſhew cauſe, (whereas the Earl of Lincoln, late High Admiral of England, had granted to them by Letters Patents, to be Vice-Admirals in the Counties of Norfolk and Suffolk,) why the ſaid Letters Patents ought not to be repealed and annulled: and ſo the ſaid Writ was in the nature of a Scire facias. And now it was moved by Coke, That although the Admiral had but an Eſtate for life, yet the Patents did continue in force after his death: As the Juſtices here in the Common Pleas, although they have their places but for life, yet they may grant Offices which ſhall be in force after their deaths, &c. And becauſe this matter is determinable at the common Law, he prayed a Prohibition; for in the Admiral Court they will judg according to the Civil Law: And the Court gave day unto the other ſide, to ſhew cauſe to the contrary, or otherwiſe a Prohibition ſhould be awarded.

Mich. 31 *Eliz.* In the Kings Bench.

CXXIX. Weſhbourn *and* Mordants *Caſe.*

IN an Action upon the Caſe, the Plaintiff declared, That where he was poſſeſſed of a parcel of Land called the Parſonage, lying adjoyning to a certain River, from the 29 of May, 29 Eliz. until the day of the bringing of this Writ, The Defendant had the ſaid twentieth day of May ſtopt the ſaid River with certain Loads of Earth, and ſo it continued until the fourteenth day of February, by which his land was drowned, and ſo he had loſt the profit of it by that time. And it was moved in Arreſt of Judgment, That upon the Declaration there doth not appear any cauſe of Action, for the Plaintiff hath made Title to the Land drowned from the twentieth of May, ſo as that day is excluded, and the Nuſance is ſaid to be made the twentieth day, and ſo it appeareth the Nuſance was before the poſſeſſion of the Plaintiff; and if it were ſo, then cannot he complain of any wrong done before his time: To which it was anſwered, That although the ſtopping was made before his poſſeſſion, yet the continuance of the ſame is after, and a new wrong, for which an Action lieth: as 5 H. 7. 4. It was preſented, That an Abbot had not cleanſed his Ditch, &c. by reaſon of which the Highway is ſtopt: The Succeſſor ſhall be put to anſwer to the ſaid Indictment, by reaſon of the continuance of it: And ſee, that continuation of a Nuſance is as it were a new Nuſance, 14 and 15 Eliz. 320. And it may be that

that the Plaintiff was not damnified until long time after the twentieth day of May, (ſcil.) after the ſtopping: And the words of the Writ here are ſatisfied and true: And afterwards Judgment was given for the Plaintiff.

Paſc. 31 *Eliz.* In the Kings Bench.

CXXX. Truſto *and* Ewers *Caſe*.

IN this Caſe it was agreed for Law, That if a Controverſie be betwixt two for the Title of a Leaſe for years, and they ſubmit the matter to Arbitrement: and the Arbitrators award, that one of them ſhall have the term: the ſame is a good Gift of the intereſt of the term: See 12 Aſſ. 25. 14 H. 4. 19. 24. But if the Award be, that the one ſhall permit the other to enjoy the term, the ſame is no Gift of the intereſt therein: See, as to the Arbitrement, 9 E. 4. 44.

Paſc. 32 *Eliz.* In the Kings Bench.

I. C. Co. Eliz. 214

CXXXI. Andrews *Caſe*.

IN the Caſe of Andrews of Grays Inn, it was holden by Gawdy and Fenner, Juſtices, That if a Leaſe for years be made by Deed indented with theſe words, demiſi & ad firmam tradidi; That upon that a Writ of Covenant lieth againſt the Leſſor, if he himſelf entereth upon the Leſſee; but contrary if a ſtranger enter, if it hath not clauſe of Warranty: For by Fenner, when Covenant is brought upon that word Demiſi, the Plaintiff ſhall recover the term it ſelf, but not damages, and that cannot the Plaintiff do when a ſtranger entereth; and that was holden for clear Law: See 9 Eliz. Dyer 257. A covenant againſt the Heir in ſuch caſe.

Hill. 32 *Eliz. Rot.* 549. In the Kings Bench.

CXXXII. Bigg *and* Clarks *Caſe*.

IN an Action upon the Caſe in the Court of Hertford, the Plaintiff declared, How that the Defendant hired a Horſe of the Plaintiff to carry three Buſhels of Coals from Ware to his Houſe in Hertford, and that the Defendant in conſideration thereof did promiſe the Plaintiff, quod ipſe in via prædicta nollet onerare the ſaid Horſe aliter, then with the ſaid three Buſhels of Coals: And the Plaintiff ſaid, That the Defendant had loaded the ſaid Plaintiffs Horſe with a greater weight then with the ſaid Coals, and ſo had hurt his Horſe, upon which the Plaintiff recovered: And Error was brought, and the Error aſſigned was this, That it is not ſpecially ſhewed, how the Defendant aliter loaded the ſaid Horſe, with what thing: As 19 H. 6. In Debt againſt Executors, they plead, That they have onely expended ſuch a ſum of the Goods of the Teſtator in Funeral expences, abſque hoc, that they have adminiſtred aliter, vel alio modo; the Plaintiff cannot by Reply ſay, that they have adminiſtred aliter, vel alio modo, without ſhewing how. Another Error was aſſigned, becauſe it is not certainly ſhewed, how the Horſe was hurt; but that Exception was not allowed, for it is not the point of the Action: but for the firſt matter, the Judgment was reverſed.

Trin.

Trin. 32 *Eliz.* In the Kings Bench.

CXXXIII. Toley *and* Windhams *Case.*

IN an Action upon the Case, the Plaintiff declared, That whereas certain Controversies were betwixt the Plaintiff and Defendant for the profits of certain Lands which the Father of the Defendant had taken in his life-time: and whereas he had brought a Writ of Subpœna out of the Chancery against the Defendant for the said profits taken by the Father of the Defendant in his life, intending to put in a Bill against the Defendant in the said Court: The Defendant, in consideration that the Plaintiff would stay his intended Suit, promised, That if the Plaintiff can prove, that the Father of the Defendant took the profits, or had the possession of the said Land under the Title of the Father of the Plaintiff, that he would pay to him for all the said profits: And further declared, That he had proved, that his Father had taken the profits under the Title of the Father of the Plaintiff. Coke took Exception to the Declaration, because it is not shewed, How and by what means, under the Title of the Father of the Plaintiff, he took the profits, as by Lease, for that is traversable. Gawdy, Justice, The Son hath not any cause of Action or Suit for the profits taken in the time of the Father, and therefore the staying of Suit conceived upon such matter is not any consideration: But as to the other Exception, because it is not shewed how, and by what Title he took the profits, it is well enough. As unto the other Exception, it was moved at another day, that there was a Case betwixt Stone and Withypool; An Infant promiseth to pay a simple Contract, and thereupon there was a Suit in the Chancery, but it was holden that it was not maintainable, for the promise was voyd, because there was no consideration. And it was agreed by all the Justices, that this Action would not lie; for the Plaintiff hath declared, That where certain Controversies were betwixt the Father of the Defendant and him, (scil.) the Plaintiff himself, for the profits of certain Lands, which the Father of the Defendant had taken in the time of the Father of the Plaintiff, &c. and he doth not shew, that he himself is Heir or Executor of his Father, and therefore the Chancery cannot give him any remedy: and on the other side, if the Plaintiff had any remedy, the same ought to be against the Executors of the Father of the Defendant; and the Plaintiff hath not alledged, that the Defendant is Executor to his Father, and therefore he hath not any colour of Suit against him, nor therefore is there any consideration. Fenner, The Defendant by the Law is not chargeable, nor in conscience upon this matter he shall be charged; for by the same reason he should be charged for the simple Contract of his Father, and a promise to pay it will not binde him: And afterwards Judgment was given against the Plaintiff.

Stone and Withypools Case.

Trin. 32 *Eliz.* In the Kings Bench.

CXXXIV. Veal *and* Roberts *Case.*

IN an Ejectione Firmæ, the Plaintiff declared, How that John Veal leased to him 30 Eliz. for twenty one years ten Acres of Lands called M. The Defendant pleaded, That before the Demise and Ejectment, one John Roberts was seised of the said ten Acres called M. in Fee, and 14 Eliz. demised the same to one John Cox for life, and afterwards 25 Elizab.

John Roberts dyed, and the Reverſion deſcended to the now Defendant; Cox demiſed the Land to John Veal for thirty years, who leaſed unto the Plaintiff, as in the Declaration, for which he was poſſeſſed quouſque, &c. Cox dyed 30 Eliz. after whoſe death the Defendant entered and ejected pro ut was lawful for him to do, &c. The Plaintiff by Replication ſaith, That before John Roberts had any thing, one Wall of P. of Gloceſter was ſeiſed of the ſaid ten Acres inter alia, and 29 H. 8. demiſed to John Veal, Father of the Leſſor of the Plaintiff, the ſaid Land inter alia, by the name of two Meſſuages and two Yard Lands in the County of Gloceſter, nuper in tenura J. S. and of two other Houſes and a Yard Land tunc in tenura E. H. nec non de ten acres vocat. M. lying inter C. & J. tunc in occupatione E. W. for term of years yet during, Habendum dict. four Meſſuages, and three Yard Lands, in tenura J. S. & C. H. nec non the ſaid ten acres to the ſaid John Veal, à tempore mortis ſurſum redditionis forisfactur. vel determinationis ſtatus vel terminor. prædict. J. H. & W. in eiſdem, for ſixty years; by force of which he was poſſeſſed of the intereſt of the term aforeſaid: and afterwards 14 Eliz. the Eſtate of the ſaid E. W. in the ſaid ten acres ended, for which the ſaid John Veal entered, and 25 Eliz. dyed inteſtate; and Adminiſtration was committed to J. S. Leſſor of the Plaintiff, by force of which he entered, and Leaſed to the Plaintiff, and ſo he was poſſeſſed until ejected: The Defendant did rejoyn, and ſaid, That long before John Roberts had any thing, William Roberts was ſeiſed in Fee, and enfeoffed the ſaid John Roberts before the Ejectment ſuppoſed, who demiſed unto John Cox, and ſo as in the Bar, abſque hoc, That the ſaid Abbot demiſed to the ſaid John Veal, modo & forma pro ut the Plaintiff replicando allegavit, the which matter he is ready to aver, & petit Judicium: The Plaintiff ſaid, That the Abbot demiſit ut ſupra, & hoc petit quod inquiratur per patriam: and it was found for the Plaintiff. And it was objected by Snag, That this iſſue was not well taken, for the Eſtate of John Veal was not to begin before all the Eſtates, being in eſſe at the time of the making of the Leaſe by the Abbot of Gloceſter, are expired. Coventry contrary; and that the Eſtates do begin ſeverally, and ſingulatim, as the Eſtates precedent ſhall end, and ſhall not expect until the other Eſtates be determined; which ſee Juſtice Needhams Caſe, now reported by Coke, 5 part. 37 Eliz. and ſee there Pollards Caſe there cited. At another day it was objected by Snag, That the new Eſtate could not begin in any part until all the former Eſtates be determined; for if this new Leaſe be made, reſerving Rent, and one part thereof is now come in poſſeſſion, then he ſhould pay for that part all the Rent: But the Court was clear of Opinion, That the Leaſe in the ten Acres did begin preſently, without having regard to the other Eſtates in demand; for the intent of the Leſſor was, That no mean time ſhould be betwixt the expiration of the Leaſe for ten years, and the begining of the new: As in the Caſe betwixt Wroteſley and Adams, 1 Eliz. Plo. 198. A Leaſe is made to begin after the expiration of a former Leaſe for years; the firſt Leſſee takes a new Leaſe of the Leſſor, which was a Surrender of the former Leaſe; If the Leaſe, (ſcil.) the ſecond Leaſe, ſhall now begin? was the queſtion: or ſhould expect until the firſt Leaſe ſhould end by expiration, for the former Leaſe is ended, but not expired, i. by effluction of time: And it was holden, that the ſaid ſecond Leaſe ſhould begin preſently; for the intent of the Leſſor was, that no mean time ſhould be betwixt the end and begining of the ſaid Eſtates. And afterwards Judgment was given for the Plaintiff.

Caſe.

CXXXV. *Paſc.* 32 *Eliz.* In the Kings Bench.

NOte, If a Record be removed out of the Common Pleas into the Kings Bench by Writ of Error, and the Plaintiff will not aſſign his Errors, then a Scire facias ſhall iſſue forth, quare executionem habere non debet: and upon ſummons, and two Nichels returned, the Plaintiff ſhall have Execution, yet the Plaintiff may aſſign his Errors. And to ſuch a Superſedeas Exception was taken, becauſe the Writ was coram nobis apud Weſtm. where it ſhould be, ubicunque fuerimus in Anglia: and for that cauſe a Superſedeas was granted. It was alſo holden, That although a Writ of Error doth not lie here, upon a Judgment given in London; yet upon a Judgment given at Newgate, which is upon Commiſſion in their Seſſions, Error lieth here.

Paſc. 32 *Eliz.* In the Kings Bench.

CXXXVI. Bows *and* Vernons *Caſe.*

DEbt upon an Obligation was brought by Bows againſt Vernon and Hennington, who pleaded the Statute of 23 H. 6. and ſhewed, that Vernon was in Execution, and that the Bond was made for his deliverance againſt the Statute: The Plaintiff replyed, and ſaid, That at the time of the making of the ſaid Bond, the ſaid Vernon fuit ſui juris, and at large, abſque hoc, that he was in priſon tempore confectionis ſcripti prædict. modo & forma, &c. Egerton, Sollicitor, moved, that the Traverſe was not good; for if a man be in priſon in Execution, and makes a promiſe to make a Bond, for which he is enlarged, and within an hour after he makes the Bond, the ſame is within the Statute: and therefore this iſſue is not well joyned, but it ought to be abſque hoc, that it was made pro deliberatione, &c. and of ſuch Opinion was Fenner and Gawdy, Juſtices: See Dive and Manninghams Caſe, 4 E. 6. Plo. Com. 68, 69. acc.

Hill. 29 *Eliz.* In the Common Pleas.

CXXXVII. Hunt *and* Sones *Caſe.*

IN an Action upon the Caſe, the Plaintiff declared, That whereas he the ſaid Plaintiff was ſeiſed in his Demeſn as of Fee, of certain, and ſhews the certainty of them; the Defendant Sone, in conſideration that the ſaid Plaintiff permitteret the ſaid Sone, occupare terras prædictas ab eodem die, (ſcil.) 20 Julii, 27 Eliz. uſque ad ſecundum diem Novembris, quod eſſet in Anno Dom. 1589. ſuper ſe aſſumpſit, quod ipſe idem W. Sone ad feſtum omnium ſanctorum proxime ſequen. 10 l. 2 s. 6 d. ac abinde annuatim durante termino dicto 20 l. & 5 s. at feſta Annunciationis beatæ Mariæ, ac omnium Sanctor. per æquales portiones ſolvend. eidem Hunt (the Plaintiff) bene & fideliter contentare vellet: Ac licet prædict. W. Hunt permiſit præfat. Sone occupare terras prædict. à dict. 20 die Julii, 27 Eliz. uſque ad ſecundum diem Novemb. 28 Eliz. Licetque poſt dictum 20 diem Julii, 27 Eliz. & ante prædict. diem 2 Novemb. Anno 28 Eliz. dictum feſtum omnium Sanctor. Anno 27 Eliz. ſupradict. ac feſtum Annunciationis beatæ Mariæ Virginis, ac feſtum omnium Sanctor. 28 Eliz. præterierunt, prædict. ta-

men W. Sone dict. 10 l. 2 s. 6 d. ad prædict. feſtum omnium Sanctor. proxime ſequent. poſt permiſſionem & aſſumptionem prædict. ac aliud 10 l. 2 s. 6 d. ad feſtum Annunciationis 28 Eliz. ac alia 10 l. 2 s. 6 d. ad feſt. omnium Sanct. Anno 28 Eliz. ſupradict. nondum ſolvit, &c. The Defendant pleaded, That the Plaintiff entered into parcel of the premiſſes ultimo Octob. 28 Eliz. & eadem occupare eidem W. Sone non permiſit: upon which they were at Iſſue, and it was found for the Plaintiff: And now it was moved in ſtay of Judgment, That the Plaintiff had not cauſe of Action before the whole term be expired, for it is an entire Aſſumpſit, and cannot be by Action ſevered; and therefore it was ſaid, That if I promiſe to pay you 20 l. viz. at ſuch a Feaſt 5 l. and at ſuch a Feaſt other 5 l. &c. there before the laſt day of payment no Action lieth, for the ſum of 20 l. is one and entire: but if I promiſe to another at Eaſter next 10 l. and at Midſummer as much, &c. here are ſeveral Aſſumpſits; and upon default of payment of the firſt ſum Actio oritur, without reſpecting the laſt payment: But at the laſt the Court was agreed, That Judgment, notwithſtanding the ſaid Exception, ſhould be given for the Plaintiff: and ſaid, That the Declaration was well enough, as well in reſpect of the Exception aforeſaid, as alſo that this word [licet] is effectual enough for the ſetting down the permiſſion.

Trin. 30 *Eliz.* In the Kings Bench.

CXXXVIII. Ropers *Caſe.*

ROper was robbed by Smith, and within a week after the Robbery he preferred an Indictment againſt him, and within a month after the Robbery he ſued an Appeal againſt Smith, and proſecuted the ſame until he was out-lawed; and thereupon Coke moved to have reſtitution of the Goods taken: And B. of the Crown-Office ſaid, That the Freſh-ſuit was not enquired; for upon an Appeal one ſhall not have Reſtitution without Freſh-ſuit. Coke, The Books are, That if the Defendant in an Appeal of Robbery be attainted by Verdict, the Freſh-ſuit ſhall be enquired of: but here he was attainted by Out-lawry, and not by Verdict, and ſo the Freſh-ſuit cannot be enquired: and here the Indictment within a week, and the Appeal within a month after the Robbery, is a Freſh-ſuit. Wray, Freſh-ſuit in our Law is to purſue the Felon from Town to Town, but the ſuing of an Appeal is not any Freſh-ſuit: See 21 E. 4. 16. Reſtitution granted upon an Out-lawry in an Appeal of Robbery without Freſh-ſuit enquired: 1 H. 4. 5. if he confeſs the Felony: See 2 R. 3. 13.

Trin. 30 *Eliz.* In the Common-Pleas.

CXXXIX. Piggot *and* Ruſſels *Caſe.*

NOte, it was agreed per Curiam in this caſe, That if Tenant for life being of full age, and he in the Remainder within age levy a Fine, and afterwards the Infant reverſeth the Fine as to him for the Inheritance, he ſhall not enter for forfeiture, becauſe he joyned in the Fine, and ſo aſſented to it.

Trin.

Trin. 29 *Eliz.* In the Kings Bench.

CXL. Sir John Savages *Caſe.*

Not Law 1. P. W. Cg.

IN Treſpaſſe, the Defendant juſtified, becauſe Sir John Savage was ſeiſed of the Mannor of D. within which Mannor the cuſtom is, That if any man taketh to wife, any cuſtomary Tenant of the ſaid Mannor, and hath iſſue, and ſhall overlive his wife, he ſhall be Tenant by the Curteſie; and pleaded further, That he took to wife one Anne, to whom, during the ſaid coverture, a cuſtomary Tenement of the ſaid Mannor did deſcend, and that he had iſſue by the ſaid Anne, and that ſhe is dead, and ſo, &c. and it was adjudged, That the huſband by this cuſtom upon this matter, ſhould not be Tenant by the Curteſie; for Anne was not a cuſtomary Tenant of the ſaid Mannor at the time of the marriage.

Po. 208. Com. Dig. Copyhold K. 11.

Trin. 29 *Eliz.* In the Kings Bench.

CXLI. Stainsby *and* Hales *Caſe.*

IN a ſecond Deliverance by Stainsby againſt Hales, Challenge was taken for the Hundred, and it was ſhewed and confeſſed, That the Hundred of Feverſham in Kent, was and is within the Lathe of Seray, and that there is not, nor ever had been any Court holden in the ſaid Hundred of Feverſham, but that all the Inhabitants within the ſaid Hundred have uſed to go to the Court of the Lathe of Seray: and it was holden by all the Juſtices, That in this caſe Challenge ought to be taken for the Lathe, and not for the Hundred, for no Court had been holden in the Hundred; See 2 H. 4. 6. 11 H 4. 2. A Juror was challenged for the Hundred, and the Triors ſaid, That the party challenged was not of the ſaid Hundred, where, &c. but they further ſaid, that there were ſix Hundreds, all which came to one Court; and the ſame was holden a good anſwer to the challenge, and the party challenged was ſworn.

Trin. 27 *Eliz. Rot.* 1201. In the Kings Bench.

CXLII. Sands *and* Hempſtons *Caſe.*

IN a Replevin, The Caſe was, That Henry, Earl of Weſtmerland, was ſeiſed of the Mannor of Kennington in Fee, and granted a Rent-charge to William Cordel, afterwards Maſter of the Rolls for life, and afterwards made a Feoffment thereof to Sir John Clifton, who granted a Copihold to Sands for life, according to the cuſtom of the ſaid Mannor, the ſame being an ancient Copihold; Sir John died ſeiſed, the Rent is behinde, Sir Willam Cordel died, Hempſton as Bailiff of Cary, Executor of Sir William Cordel, diſtrained for the arrearages upon the poſſeſſion of Sands, and it was clearly holden by the whole Court, That the poſſeſſion of the ſaid Copiholder was not chargeable to diſtreſſe upon this matter, for the Copiholder is not in by him who ought immediately to pay the Rent, but is alſo in by the cuſtom: Note by ſome, That the poſſeſſion of a Copiholder, is not liable to the Executor, by the Statute of If it be ſo, that the Lord of the Mannor be within the degree limited by the ſaid Statute.

Trin.

Trin. 29 *Eliz.* In the Common Pleas.

CXLIII. Hoopers *Caſe.*

HOoper of Salisbury, was brought to the Bar, to wage his Law in an Action of Debt, and upon examination, the matter appeared to be, That the Defendant was indebted to the Plaintiff upon a ſimple Contract, and upon communication betwixt them, it was agreed, that one J. S. ſhould become bounden to the Plaintiff in an Obligation for the ſaid debt, to be paid at a day certain, which J. S. became bound accordingly, and the Defendant was alſo bound to the ſaid J. S. in a counterbond for to ſave him harmleſſe againſt the Plaintiff. And the Court was of cleer opinion, that upon this matter, the Defendant could not ſafely wage his Law; for by this Obligation, made by a ſtranger to the Contract, the Contract upon which the Action is brought is not determined: And alſo here the Obligation was made after the Contract; But if J. S. had been bound, Ut ſupra, upon the Contract, it had been otherwiſe; and upon that reaſon, the Caſe of one Pudſey was adjudged. Where, upon the Contract, a ſtranger to the Contract being preſent, made promiſe to enter into a Bond unto the party, &c. for the paiment of the money, agreed upon the Contract, and afterwards became bounden accordingly; in that Caſe, the Contract was determined, becauſe the Obligation was purſuant to the Contract; and in the principall Caſe, the Court would not admit the Defendant to wage his Law, although he earneſtly deſired it.

Pudſeys Caſe.

Trin. 29 *Eliz.* In the Common Pleas.

CXLIV. Knevit *and* Taylors *Caſe.*

KNevit enformed againſt Taylor in the Common Pleas, upon the Statute of Uſury, and the parties were at iſſue, and the matter depended four Termes untried after iſſue was joyned; and now the Defendant prayed, that for his own expedition, that he might have Niſi Prius with Proviſo, as the courſe is in the Exchequer in ſuch caſe, to ſend Commiſſions into the Countrey where the Information is laid for the triall of the iſſue joyned in the ſaid Court, and that at the ſuit of the Defendant. And it was much doubted, if the Court might grant ſuch Niſi Prius, becauſe the Queen is Quodammodo, a party to the ſuit. And by Fleetwood, Serjeant, The common courſe is ſo; But where the Queen her ſelf is meerly party, no ſuch Niſi Prius ſhall be granted: and he ſaid, That the Informer might be Nonſuit, although that the Queen be in ſuch manner party. Nelſon, Prothonotary, ſaid, That he never ſaw ſuch a Preſident, See F. N. B. 241.

Trin. 29 *Eliz.* In the Kings Bench.

CXLV. Alford *and* Leas *Caſe.*

S. C. Cro. Eliz. 54

ALford brought Debt upon a Bond againſt Lea, and the Caſe was, That the parties were bound the one to the other upon Condition, to ſtand to the Award of B. and C. who award, that the ſaid Lea, before ſuch a Feaſt, ſhall make a releaſe to Alford, but no place aſſigned where the releaſe ſhall be delivered to the Plaintiff. Lea, before the ſaid Feaſt, ſealed a releaſe according to the award, and delivered the ſame to one Pine, to the uſe of the Plaintiff, who delivers it to one Maſon, one of the ſervants of Alford, the

the Plaintiff, who two or three days after, offers to Alford, but he refuſed it. It was holden by Wray, That the award upon this matter was well performed, notwithſtanding the refuſall of Alford, See Tawes Caſe, 1 Eliz. Dyer 167. A. enſeals, Quoddam ſcriptum Obligat. and delivers the ſame one C. for to deliver it to the Obligee, who delivered it accordingly, as the Deed of A. who refuſeth to receive it; and after gets the Obligation, and recovers upon it.

Trin. 30 *Eliz.* In the Kings Bench.

CXLVI. Marſh *and* Rainsfords *Caſe.*

IN an Action upon the Caſe; the Caſe was, That a communication was had betwixt the parties, That the Plaintiff ſhould marry the daughter of the Defendant, in conſideration of which, the Defendant promiſed the Plaintiff to give him 200 l. but they could not agree upon the days of paiment of it, after which, they ſtole away the Defendants daughter, and ſecretly married her, without the Defendants knowledge; yet afterwards the Defendant gave his conſent to it, and allowed of the ſaid marriage; and in conſideration of the ſaid marriage, promiſed to pay the Plaintiff 100 l. Egerton, Sollicitor Generall for the Defendant, That the Action upon this matter will not lie, for here the conſideration is precedent to the promiſe, whereas the conſideration in ſuch caſes, ought to be future and ſubſequent; and as the Caſe is here, the Plaintiff is out of the courſe of conſideration of marriage; for he hath ſtolen away and married his wife, without the knowledge or conſent of her father: See ſuch Caſe, 10 Eliz. Dyer, 272. The ſervant of one A. is arreſted in London, and two friends of his Maſter bail him, and afterwards A. promiſeth to them, for their friendſhip, to ſave them harmleſſe from damages and coſts, &c. It was holden that the Action doth not lie, for here is not any conſideration, for the bailment was of their own heads, and it is executed before the promiſe; But if the Maſter before the enlargement of his ſervant had requeſted the Plaintiff for to bail his ſervant, and he had ſo done, the Action would have lien. Wray, Juſtice, Although the conſideration be precedent, yet if it were made at the inſtance of the other party, the Action would have lien. But here, the naturall affection of the father to his daughter, is ſufficient matter of conſideration. If one cometh to a Serjeant at Law to have his counſell, and the Serjeant doth adviſe him, and afterwards the Client in conſideration of ſuch counſell, promiſeth to pay him 20 l. an Action lieth for it. And ſo Popham ſaid, it had been adjudged in the Exchequer: And it is a common Action in this Court, in conſideration, Quod querens deliberaſſet, to the Defendant, &c. He promiſeth to pay him ſo much; and as it was late adjudged betwixt Style and Smith: If a Phyſician, who is my friend, hearing that my ſon is ſick, goeth to him in my abſence, and helps and recovers him, and I being informed thereof, promiſe him in conſideration, &c. ut ſupra, to give to him 20 l. an Action will lie for the money; and afterwards in the principall Caſe, Judgement was given for the Plaintiff.

Trin. 30 *Eliz.* In the Kings Bench.

CXLVII. Williams *and* Linfords *Caſe.*

WIlliams brought an Action upon the Caſe againſt Linford, for ſlanderous words, ſpoken of the Plaintiffs land, viz. Williams is worth nothing, and do you think that the Mannor of D. is his? It is but a compact

betwen

between his brother Thomas and him; And further declared, That at the time of ſpeaking of theſe words, he was in ſpeech with one J. S. to give to the ſaid J. S. the ſaid Manno⁊ of D. fo⁊ his Manno⁊ of K. and that by reaſon of the ſaid ſlanderous wo⁊ds, the ſaid J. S. durſt not p⁊oceed in the ſaid intended exchange. It was objected, That upon this matter, an Action upon the Caſe doth not lie; Fo⁊ the ſcandalous wo⁊ds were not ſpoken to him who was to be the Purchaſo⁊ of the ſaid Manno⁊, but to a ſtranger. Fo⁊ in the Caſe betwixt Smith and Johnſon, Johnſon was in ſpeech with another to ſell his lands to him; and Smith ſaid to him who was to purchaſe them, Will you buy Johnſons land? Why, it is troubled with more charges and incumbrances then it is worth. Wray, Juſtice, There is no difference, whether wo⁊ds be ſpoken to the party, o⁊ unto a ſtranger, fo⁊ in both caſes the Title of the Plaintiff is ſlandered, ſo as he cannot make ſale of his lands: Judgement was given fo⁊ the Plaintiff.

Smith and Johnſons Caſe.

Trin. 30 *Eliz.* In the Kings Bench.

CXLVIII. Barefoot *and* Luters *Caſe.*

THe Caſe was, A. B. and C. Joint-tenants in Fee, C. granted his part unto D. and afterwards A. B. and D. Leaſed fo⁊ years, rendring Rent, and afterwards A. died, and they b⁊ought an Action of Debt fo⁊ the Rent reſerved, and declared generally, and upon the Evidence, the ſpeciall matter appeared, that two parts of the Rent did belong to B. and but the third part to D. And the opinion of the Court was; That the Declaration ought to have been ſpeciall upon the whole matter; Fo⁊ Prima facie, it was conceived that each of the Plaintiffs ought to have had the moyetie of the Rent, and that is a ſuppoſall of the Declaration; But now upon the Evidence, it appeareth to the contrary: So as the Defendant, Rein doit, in that fo⁊m; Another matter was, The Plaintiff declared of Rent of a whole year, ended at the Feaſt of St. Michael laſt paſt, whereas the Rent was not due at Michaelmas, as the Plaintiff had declared, but the thirtieth day after.

Trin. 32 *Eliz.* In the Kings Bench.

CXLIX. Brown *and* Ordinacres *Caſe.*

HEnry Brown, and Joice his wife, Executo⁊s of Thomas Brown, b⁊ought an Action upon the Caſe againſt Van Ordinacre, Alien, and declared, That where A. and B. were indebted to the Teſtato⁊, The Defendant, in conſideration that the Teſtato⁊ reſpectuaret the ſaid A. and B. pro ſolutione debiti prædict. per ſpacium unius ſeptimanæ tunc proxima ſequen. to pay the Debt to the ſaid Plaintiffs, modo ſequent. viz. one moyetie within one week after, and the other moyetie at the end of the ſaid week; and further declared, That the Teſtato⁊ did fo⁊bear by the ſpace of a week; and after Imperlances, Joice was ſummoned, and ſevered. The Defendant pleaded, That he did not p⁊omiſe, modo & forma pro ut prædict. Brown allegavit, and that was alledged by both Executo⁊s. And by a Jury, De medietate Linguæ, it was found fo⁊ the Plaintiff. It was objected by Coke, That here is not any iſſue, pro ut Brown querens allegavit, where in truth, it was alledged by both the Executo⁊s, before ſeverance, and not by Brown onely. Alſo here is not any ſufficient conſideration alledged; fo⁊ the Plaintiff hath declared, That he hath fo⁊born by a week, without ſaying, next following,

as

as the conſideration is laid in the Declaration; But that it was not allowed, for ſo it ſhall be intended. It was alſo objected, That the Declaration is contrary to it ſelf; for it ſhewed, That in conſideration that the Teſtator ſhould forbear for a week, he promiſed to pay him within a week; but that exception was not allowed: For the week, in the Aſſumpſit, ſhall be conſtrued, the week after the week in the conſideration. Another exception was againſt the triall; for the Defendant being an Alien, The Venire facias was to ſummon twelve perſons, Quorum quilibet, eorum habeat 4 l. in lands of annuall Rent, and that cannot be; for Aliens cannot have lands, not being made Denizens: By the Common Law, before the Statute of 27 E. 3. An alien by the Grant of the King, might have an Action depending betwixt him and a Denizen, per medietatem Linguæ, which ſee 22 E. 3. 14. and afterwards to make the ſame a generall Law, the Statute of 27 E. 3. was made; but the ſame doth not extend to caſes where the King was party, which defect was ſupplied by the Statute of 28 E 3. cap. 13. Afterwards came the Stat. of 2 H. 5. by which it is enacted, That where the debt or damages amount to 10 marks every Juror returned for the triall, ſhould be able to expend lands of the value of 40 s. which was miſchievous as to aliens; and for the remedy of that, The Statute of 8 H. 6. cap. ult. was made, which took away the effect thereof, as unto aliens; Then came the Statute of 27 Eliz. which enacted, That every Juror, &c. ſhould expend 4 l. lands, but that is where 40 s. was required only, and doth not extend to our Caſe; and therefore the Venire facias in our Caſe, was not well awarded. To which it was ſaid by the Clarks, That after the Stat. of 27 Eliz. It had always ſo been, to make the Venire facias generally according to the Statute; but that is not a thing materiall, and the Sheriff needs not regard that: Wherefore it was holden; That the Venire facias in the principall Caſe was well awarded.

Paſc. 32 *Eliz.* In the Kings Bench.

CL. Mingey *and* Earls *Caſe.*

IN Debt upon an Obligation, The Defendant pleaded, That the Obligation was with condition, That whereas the Defendant had ſold to the Plaintiff certain wood, growing upon certain lands, called S. in the County of Suſſex. If the Plaintiff might quietly take and enjoy the ſaid woods; and if the ground whereupon it groweth be four miles from the Town of Rye, that then, &c. And for Plea he ſaid, That the Plaintiff had quietly taken and enjoyed the ſaid wood, and that the ſaid land, by the next high and uſuall way for carriages, is 4000 paces from the Town of Rye, reckoning to every pace five foot, upon which the Plaintiff did demurre in Law. Gawdy, Juſtice, For the computation of a mile, in common underſtanding, it is 1000 paces, and if it ſhall be counted by the common way, is the doubt; but the meaning of the parties was, That the Plaintiff by felling of that wood, ſhould not incur the danger of the Statute of 23 Eliz. cap. 4. And the Statute doth not reſpect the way of carriage, but that altogether, and to all intents, it be the diſtance of four miles betwixt the place where, &c. and the ſaid Town of Rye; and here it is not materiall which is the common and uſuall way to Rye for carriages; but the neerneſſe of the place where, &c. Quomodocunque, is the matter; and therefore the Defendant ought to have pleaded, That the place where, &c. is every way diſtant, four miles from Rye; and as to that, that he hath anſwered four miles, with 4000 paces, the ſame is well enough; for although he doth

not anſwer the direct words; yet if he doth anſwer in effect, it is well enough; for 1000 paces, and a mile, are all one in ſubſtance: Wray, The diſtance ſhall be accounted the neereſt way, not as a Bird may flie.

Trin. 31 *Eliz.* In the Kings Bench.

CLII. Wellock *and* Hammons *Caſe.*

This Caſe is reported by Sir Edw. Coke, in his 3 Reports: See the principall Caſe there. Here is a Limitation, and not a Condition; for if it ſhould be a Condition, it ſhould deſcend to the Heir at the Comon Law, which is the Deviſee, and ſo ſhall be extinct in his perſon, and then the reſtraint is of no effect, for there ſhall be then no meane to compell the Heir who hath the land, to pay the Legacies, nor have the Legatories any remedy to compell the ſon to pay the Legacies, which ſhall not have effect, if it be not taken by way of Limitation: and to that intent, Scholaſticas Caſe was cited, 15 Eliz. Dyer, 317. And this word, paying, in a Deviſee, ſhall never be conſtrued to be a Condition. And it was holden by the Juſtices, That where a man deviſeth lands to his younger ſon, paying ſuch a ſumme unto ſuch, the Deviſee hath a Fee-ſimple; and if he do not pay the moneys accordingly, his Eſtate ſhall determine, by the ſame Limitation, and ſhall go to the heir without any other limitation, and the quantity of the moneys, be it great or ſmall, is not materiall: And they were of opinion alſo, that here the moneys were not payable, but upon requeſt: Coke, If a man be bound to perform Covenants, and one Covenant is to pay Legacies, there he needs not pay them without a demand; But where one is expreſly bounden to pay ſuch a Legacie, there he muſt pay it at his perill. And he ſaid, That the Caſe, 28 H. 8. Dyer 33. is not Law; for there it is holden by Fitzherbart and Baldwin, That where land was deviſed unto the Prior, and Covent of S. Barthol. Ita quod reddant annuatim Decano & Capitulo Sancti Pauli. 5 l. and they fail of paiment of it, that their Eſtate ſhall ceaſe, and the Dean and Chapter, &c. ſhall have, &c. ſuch conditions void. And that up one Fee-ſimple, another Fee-ſimple cannot be limited; For by Coke, Common experience is otherwiſe, That upon a Fee-ſimple determinable, another Fee-ſimple may be limited; which Gawdy, Juſtice granted: And as to the principall Caſe, Judgement was given, with the limitation.

Hob. 323.

Paſc. 28 *Eliz. Rot.* 485. In the Kings Bench.

CLIII. Parker *and* Harrolds *Caſe.*

In Debt upon an Obligation, The Condition was, That whereas the Plaintiff and Defendant be now joyntly ſeiſed of the Office of the Regiſter of the Court of Admiralty, If the Defendant ſhall permit the Plaintiff to uſe the ſaid Office, and take the profits of it wholly to his own uſe during his life, without let or interruption done by him, that then, &c. The Defendant pleaded, That the cuſtom of the Realm of England is, That the Lord Admiral for the time being, might grant the ſaid Office, and that ſuch grant ſhould be good but for the life of the Grantor; and ſhewed further, That the Lord Clinton, Lord Admiral, granted the ſaid Office unto the Plaintiff and the Defendant, and died; and that the Lord Howard was appointed Lord Admiral, and that he 27 Eliz. granted the ſaid Office to one Wade, who ouſted and interrupted him, before which time, the Defendant did ſuffer the Plaintiff to enjoy the ſaid Office, and to take the profits of it, upon which the Plaintiff did demur in Law. Coke argued for the Plaintiff, That

The Plea of the Defendant is not good; for he hath not entitled the Lord Admiral to grant the Office; for he hath ſaid, That the cuſtom of the Realm of England is, and that cannot be good, for it cannot be tried; for a Miſne cannot be from the Realm of England: Alſo if it lie through all the Realm, then the ſame is Common Law, and not cuſtome, which ſee, Br. Cuſtom 59. and ſee 4 & 5 Ph. & Ma. 152, 153. an expreſſe Caſe of the ſame Office, and there he preſcribed, Per conſuetudinem in Curia, &c. and alſo that ſuch grant is good but during the life of the Admiral who granteth it: Alſo he doth not anſwer to any time after the grant of the Admiral Howard; for if we were lawfully put out by Wade, yet the Defendant againſt his Bond, ſhall not put us out, or interrupt us: As 5 E. 4. 115. In a Quare Impedit againſt an Abbot, and the Incumbent, who make default upon the diſtreſſe, upon which a Writ was awarded to the Biſhop for the Plaintiff, upon which the Biſhop returned, That the Incumbent had reſigned, of which he hath given notice to the Prior, and lapſe incurred; and the Biſhop collates the former Incumbent, and then this Writ came to him; Now, although the Incumbent be in by Title, yet he is bound by the Judgment: So here, although the Defendant hath another Title, and the former Title of the Plaintiff be determined, yet againſt his own Bond and Deed, he ſhall not put out the Plaintiff, &c. And the Court was cleer of opinion, That Judgment ſhould be given for the Plaintiff; but afterwards the Cauſe was compounded by Order of the Lord Chancellor.

Trin. 32 *Eliz.* In the Kings Bench.

CLIII. Bedels *Caſe.*

THe Caſe was, That A. Leaſed to B. certain Lands for 40 l. per ann. and a ſtranger covenanted with A. that B. ſhould pay unto him the 40 l. for the Farm and occupation of the ſaid Lands. A. brought an Action of Covenant; the Defendant pleaded, That before the day of payment the Plaintiff ouſted B. of his Farm: It was moved by Godfrey, that it was no Plea, becauſe this is a collateral ſum, and not for Rent iſſuing out of Land: alſo the Defendant is a ſtranger to the Contract for the Farm: But the Opinion of the Court was to the contrary; for the Defendant hath covenanted, that the Leſſee ſhall pay for the ſaid Farm and Occupation 40 l. ſo it is as a conditional Covenant, and here is Quid pro Quo; and here the conſideration upon which the Covenant is conceived, (ſcil.) the Farm, and the Occupation of it, is taken away by the act of the Plaintiff himſelf.

Paſc. 30 *Eliz.* In the Kings Bench.

CLIV. Heals *Caſe.*

HEal, a Bencher of the Inner Temple, being at the Bar; Wiat, another Apprentice at Law, informed the Court againſt the ſaid Heal, and ſhewed, That where his Clyent had obtained a Judgment in the Kings Bench: The ſaid Heal, being of Councel with the other part, did adviſe his Clyent to bring the party, who had obtained the Judgment, into the Chancery, and he procured an Order againſt him, by which he was caſt into priſon: Which matter Heal could not excuſe, but ſubmitted himſelf to the Court, ſaying, That he had ſeen a preſident which induced him ſo to do: and that was the Caſe of one Prince, where a Judgment given in this Princes Caſe.

Court was drawn into queſtion, and examined in the Chancery: But the Juſtices ſaid, That the ſame was an ill preſident, and againſt the Statute of 4 H. 4. which is, That no Judgment be undone but by Error, or Attaint.

Paſc. 30 *Eliz.* In the Kings Bench.

CLV. Gray *and* Conſtables *Caſe.*

Sir Thomas Gray covenanted with the Lady Conſtable, That where he is poſſeſſed of a Leaſe for twenty one years of certain Lands, That he will aſſure, convey, and aſſign the ſaid Leaſe to one Nevil, excepting the two laſt years of the ſaid twenty one years: and the ſaid Sir Tho. Gray was bound in a Bond to perform the Covenants of the ſaid Indenture; upon which Indenture the Lady brought Debt againſt the ſaid Sir Th. Gray, who pleaded the Conditions, and the performance of them: The Plaintiff replicando ſaid, That the Defendant non aſſuravit, conveiavit, & tranſpoſuit, Anglice, ſet over, the ſaid Leaſe; upon which they were at iſſue: And at the day of the Niſi Prius, it was moved by Cooper and Beaumont, That the Iſſue was miſ-joyned; for the Defendant pleads (as the Covenant it ſelf is) That he had aſſured, conveyed, and aſſigned the Leaſe, and ſo pleaded the performance of other Covenants, &c. The Plaintiff aſſigned the breach in this, Quod non aſſuravit, conveiavit, & tranſpoſuit, Anglice, ſet over; which word [tranſpoſuit] is not in the Covenant, nor in the pleading of the performance thereof: and the Engliſh word [ſet over] although it ſounds the ſame with aſſigning, doth not help the matter; and if the Latin word doth not agree with the matter, non refert of the Engliſh word, although in the Plea there be this word Anglice [ſet over.] Note, the Covenant was (ut ſupra) The Plaintiff aſſigned the breach, Quod non aſſuravit, conveiavit, & tranſpoſuit, Anglice [ſet over] &c. And the Defendant pleaded, Quod aſſuravit, conveiavit, & aſſignavit, Anglice, ſet over, &c. And the Court was clear of Opinion, That the Iſſue for that cauſe was not well joyned: And afterwards, by the aſſent of the parties, it was amended.

Paſc. 30 *Eliz.* In the Kings Bench.

CLVI. Dogheads *Caſe.*

An Information was upon the Statute of 27 Eliz. cap. 4. by the party grieved; which Statute gives unto the King one moyety of the value, and the other moyety to the party grieved: The Plaintiff was Nonſuit; It was holden by the Court, that he ſhall not pay coſts and damages by the Statute of 18 Eliz. for the Statute (as the Title of the ſame doth imply) is to redreſs Diſorders in common Informers; and ſo is the Preamble: and the words alſo of the clauſe of coſts and damages are [Every ſuch Informer] and ſo by Ive, Secondary of the Crown-Office, An Action given to the party grieved is not a popular Action; and the Statute of 18 Eliz. extends onely to popular Actions.

Paſc.

Paſc. 30 *Eliz.* In the Kings Bench.

CLVII. Cony *and* Chomleys *Case*.

IN an Ejectione Firmæ, after Verdict in Arreſt of Judgment, it was moved, That the Plaintiff had declared in Ejectione Firmæ, Quod cum Robertus Diggon per Indenturam ſuam gerent. dat. 20 Maii, dimiſit, &c. where he ought to have ſaid, iiſdem die & anno: For although the Indenture bear date (ut ſupra) yet it may be that it was delivered at another day, and then it doth begin to be a Demiſe. And if in an Action upon the Caſe upon Aſſumpſit to pay mony upon requeſt, although it be found for the Plaintiff, yet if no day be put in the Declaration when the requeſt was made, but onely [licet ſæpius requiſitus] in caſe where a requeſt ought to be made, there the Plaintiff ſhall not have Judgment; as it hath been oftentimes adjudged, Quod omnes Juſticiarii conceſſerunt: But yet afterwards, notwithſtanding the Objection aforeſaid, Judgment was given for the Plaintiff.

Mich. 29 and 30 *Eliz.* In the Common-Pleas.

CLVIII. Marſh *and* Jones *Case*.

IN a Replevin, the Caſe upon the Evidence was, That before the Statute of Quia Emptores terrarum, a man made a Feoffment in Fee, to hold of him by the Service, ſolvendi poſt quamlibet vacationem five alienationem, the value of the annual profits of the Lands: And it was holden by the Court, That the value ſhall be intended ſuch a value, as was the value at the time of the Feoffment made, and not as it is improved by ſucceſſion of time.

Mich. 29 and 30 *Eliz.* In the Kings Bench.

CLIX. Willoughbies *Case*.

WIlliam Willoughby and two other were indicted, That whereas the Parſon of the Church of D. and all his predeceſſors have uſed to have Common in ſuch a place, the ſaid Willoughby, &c. vi & armis, &c. had incloſed it, and the Incloſure was upon their own Lands: It was moved, That upon this matter they ought not to be indicted, but the party grieved is put to his Action; as where a Preſentment is made of a Diſſeiſin: See 27 Aſſ. 20. And it was the Caſe of one Morden, 29 Eliz. upon the ſtopping of a Way upon his own Land: and it was ſaid, That if it ſhould be upon the Lands of another, it were not material: for it is but a hinderance from taking of Common, which cannot be vi & armis. Alſo it was ſaid, That the Indictment is recorded and certified, as found before the Juſtices of Aſſiſe and Goal-delivery, and they cannot take ſuch Preſentments: And although the ſaid Juſtices of Aſſiſe and Goal delivery were in rei veritate alſo Juſtices of the Peace, yet the Indictment being recorded, and certified to be taken before them, in quality of Juſtices of the Peace, will not help it: for the Court ſhall not reſpect any other Authority, but that which appeareth upon Record: and therefore for the cauſes aforeſaid they were diſcharged by the Court. Mordens Caſe.

Hill.

Hill. 30 *Eliz.* In the Kings Bench.

CLX. Collet *and* Robſtons *Caſe. Error.*

COllet and Andrews recovered in a Writ of Account againſt Robſton: Hil. 29 Eliz. Rot. 1. and now Robſton brought a Writ of Error, and aſſigned for Error, That whereas the ſaid Writ of Account was brought againſt the ſaid Defendant as Receiver of Monies, for to render Account, quando ad hoc requiſitus fuerit, the ſaid Writ ought to have been more ſpecial: But the Opinion of the Court was, That the Writ in his generalty was holden good: And ſo it was adjudged in the Caſe of one Gomerſal, (ſcil.) quod reddat ei rationabilem computum ſuum de tempore, quo fuit Receptor Denariorum ipſius A. Another Error was aſſigned, That the Jury had aſſeſſed damages which ought not to be given in an Action upon Account: which ſee 2 R. 2. Acco. 45. and 2 H. 7. 13. But ſee the Book of Entries, fo. 22. In a Writ of Account againſt one, as Receivor to Account render, damages were given: For if my Bayliff, by imploying of my Monies, whereof he was the Receivor, might have procured to me profit and gain, but he neglects it, he ſhall be chargeable to me in right, and ſhall anſwer for it. And here in our caſe, damages ſhall be given: and afterwards, notwithſtanding all Objections made to the contrary, the Judgment given before was affirmed.

Hill. 30 *Eliz.* In the Kings Bench.

CLXI. Yates *Caſe.*

A Writ of Error was brought by Yates and others upon a Judgment given in a Writ of Partition; and it was aſſigned for Error, that the Writ of Partition was not ſufficient; for it is there ſet forth, That the Plaintiffs inſimul & pro indiviſo tenent cum defendente, &c. and do not ſhew, of what Eſtate, or whoſe inheritance: See F. N. B. 61 5. and 62. a. inſimul & pro indiviſo tenent de hæreditate quæ fuit A. matris of the Plaintiff and the Defendant. And yet ſee F. N. B. 62. A. A Writ of Partition betwixt ſtrange perſons, without naming hæreditate in the Writ: And ſee alſo that a Partition of Lands in London, without ſhewing of what Eſtate: See Regiſter 76. 6 Eliz. in a Partition by Courtney againſt Polewheel, no Eſtate ſhewed in the Writ: ſo betwixt Finch and Firrel, and betwixt Fry and Drake, 14 Eliz. Devon. 26 Eliz. betwixt the Lord Cheney and Bell: and Mich. 4 and 5 Ph. and Ma. Rot. 208. It was holden, That it is not neceſſary in ſuch a Writ to ſhew the Eſtate: and ſuch alſo was the Opinion of the Court in the principal Caſe: but Tenants in common ought to ſhew it in the Count: And the Judgment given was affirmed.

Courtney and Polewheels Caſe. Finch & Firrils Caſe. L. Cheney and Bells Caſe.

Mich. 29 and 30 *Eliz.* In the Kings Bench.

CLXII. Phillips *and* Stones *Caſe.*

IN Debt upon an Obligation, the Defendant pleaded the Statute of 32 H. 6. upon which this ſpecial matter was found, That one J. S. had heretofore recovered againſt him 100 l. in an Action of Debt, and upon the Capias ad ſatisfaciend. he was taken and committed to the Plaintiff, who was

was Goaler, &c. to the Sheriff, and ſo being in Execution he eſcaped: and afterwards he was re-taken by the Plaintiff, and kept in priſon; and ſo being in priſon, made the Bond upon which the Action is brought: It was ſaid by the Court, That if a Priſoner being in Execution, eſcapes with the permiſſion of the Goaler, the Execution is utterly gone and extinguiſhed; and the Plaintiff, at whoſe ſuit he was taken in Execution, ſhall never reſort to him who eſcapes, but ſhall hold himſelf to the Goaler for his remedy: but if ſuch a Priſoner eſcapeth of his own wrong without the privity or conſent of the Goaler, the Goaler may well take him again for his indemnity, until the Plaintiff hath determined his Election, whether he will have his remedy againſt the Goaler, or that he will maintain his Execution: 13 H. 7. 1, and 2. But as unto the Statute of 23 H. 6. the Court was of Opinion, That poſito that the party who eſcapes cannot be taken again; yet being taken, the Bond which is taken colore Officii, is within the ſaid Statute, becauſe the party was re-taken colore Executionis, and ſo the Bond was void.

Mich. 29 & 30 *Eliz.* In the Kings Bench.

CLXIII. Gerings *Caſe.*

IN Debt upon a Obligation, againſt one as Executor; the Caſe was, That the Teſtator of A. by his Will, appointed certain lands, and named which ſhould be ſold by his Executor, and the moneys thereof coming, to be diſtributed betwixt his daughters, when they have accompliſhed the age of one and twenty years. The lands are ſold, and the moneys thereof being in the hand of the Executor, untill the full age of the daughters ſhall be Aſſets to pay the debts of the Teſtator, was the queſtion; And it was the opinion of the whole Court, that the ſaid means ſhould not be Aſſets, for they ſaid, that that money is limited to a ſpeciall uſe: Quære of this Caſe; For I have heard, that it was afterwards reſolved in another Caſe, that the moneys in the like Caſe remaining in their hands ſhould be Aſſets.

Mich. 29 & 30. *Eliz.* In the Common Pleas.

CLXIV. Davies *and* Percies *Caſe.*

BEtween Margaret Davies and one Perce, the Caſe was, That one Anth. Perce, upon ſpeech of a marriage to be had betwixt the ſaid Anthony, and the mother of Margaret, covenanted by Indenture with certain friends of the mother, to pay to all the daughters of the mother 20 l. a piece at their ſeverall ages of four and twenty years, and to perform the Covenant, was bound to the ſaid friends in an Obligation. Anthony Perce made his Will, and willed, that his Executors ſhould pay to each of the daughters 20 l. at their ſeverall ages of four and twenty years, in diſcharge of the ſaid Covenant, and died; Now the ſaid Margaret ſued the Executors in the Spirituall Court for the 20 l. bequeathed to her, and upon this matter, the Executors prayed a Prohibition: And by the Lord Anderſon, a Prohibition will lie; for here is no Legacie, but the Will referres to the Covenant, and is in diſcharge of the Covenant: As if A. be indebted to B. in 20 l. And if A. by his Will willeth that his Executors ſhall pay to the ſaid B. 20 l. in diſcarge of the ſaid debt, the ſame is not any Legacie, but a Declaration that the intent of A. is, that the debt ſhall be paid. Periam Juſtice, was of the ſame opinion as the Lord Anderſon; and Anderſon ſaid, If a Legacie be bequeathed

queathed to me, and the Executor covenants to pay me the ſaid Legacy, and afterwards I. ſueth the Executor in the Spirituall Court, he ſhall have a Prohibition; Quod cætert Juſticiarii negaverunt, See F. N. B. 44. Br. If the Teſtator by his Will charge his Executors to pay his debts and his creditors, they do not pay them, and the creditors ſue them in the Spiritual Court, they ſhall not have a Prohibition, which Anderſon Vehementer negavit; and afterwards the Juſtices looked and adviſed upon the Indenture, and found that the Indenture and Obligation were made to the friends of the mother of the daughters, and not to the daughters themſelves, to whom the Legacies were given and bequeathed; and therefore were of opinion, that a Prohibition did not lie.

Vide 6 H. 3. Prohib. 17.

Hill. 30 *Eliz.* In the Common Pleas. *Rot.* 336.

CLXV. Thorp *and* Tomſons *Caſe*.

IN Ejectione firmæ. It was found by ſpeciall Verdict, That one Thimblethorp was ſeiſed of the lands where, &c. and by Contract, ſold the ſame to Thorp, but no aſſurance was yet made; and afterwards Thorp before any aſſurance made, ſold likewiſe the ſaid lands to Tomſon, and afterwards, Thimblethorp made aſſurance thereof to Tomſon, and afterwards Tomſon being ſeiſed, deviſed the lands to his younger ſon, by theſe words: I bequeath to R. my ſon, all the lands which I purchaſed of Thorp, whereas, in ſpeaking the truth, according to Law, he purchaſed them by immediate aſſurance of Thimblethorp, although he did contract with Thorp for the ſame; And the opinion of the whole Court was without argument either at Bar, or at the Bench; That the Deviſe was good; for in the repute of the people, they were poſſeiſed of Thorp, for Tomſon paid the moneys for the ſame to Thorp, and the Court commanded Judgement to be entred accordingly: And afterwards Exception was taken to the Verdict, becauſe it is not found by what ſervice the land deviſed was holden, Socage, or Knights-ſervice; nor that the Deviſor is dead; and theſe were holden to be materiall Exceptions, and for that cauſe, the Judgement was ſtayed, and afterwards the Verdict was rejected, and a Venire facias de novo awarded.

Hill. 30 *Eliz.* In the Common Pleas.

CLXVI. Grove *and* Sparres *Caſe*.

AN Action of Treſpaſſe was brought by Grove againſt Sparre, Proces continued untill Sparre was outlawed; and now it was moved unto the Court, to avoid the Outlawry, That the originall Writ, and all the Judiciall Proces thereupon are directed Vice-Com. Wigorn. and in the Filazars Roll, in the Margent, is written, Hereford, and in the body of the ſaid Roll is written, Et prædictus Grove obtulit ſe quarto die poſt, Et Vicecomes modo mandat. quod prædictus Spar non eſt inventus, &c. Ideo præceptum eſt Vicecom. &c. and at the Capias retorned, it is entred in the Roll as before, Hereford: whereas the Capias is directed Vicecom. Wigorn. as of right it ought to be: and the Roll was peruſed by the Court, and it was, ut ſupra, and that without any ſuſpicion of Raſure; for which the Court gave day to the Queens Serjeants to adviſe themſelves to maintain the Outlawry, and the Defendants Councel prayed, That a Recordatur be made in what Eſtate the Roll now is, for doubt of amendment by way of Raſure, or otherwiſe; which was granted by the Court.

Mich.

Mic. 33 *Eliz.* In the Exchequer.

CLXVII. Ruſhtons *Caſe.*

RUſhton was indebted to the Queen in 200 marks, upon which iſſued an Extent againſt him out of the Exchequer to levie the ſaid ſumme to the Sheriff of Suffolk; and it was found by Inquiſition, That Ruſhton 22 Junii, 22 Eliz. was poſſeſſed of a Leaſe for the term quorundam annorum adhuc venturorum; and the debt of the Queen did begin 12 Febr. 17 Eliz. Exception was taken to this Office, becauſe that the term is not certainly found, but generally quorundam annorum; and it was ſaid by Coke, That the Office was good, notwithſtanding that Exception, for the Queen is a ſtranger to the Leaſe, and therefore ought not to be forced to finde the preciſe certainty; which ſee in Partridges Caſe in Plowd. The Defendant had made a Leaſe Pro termino quorundam annorum contra formam ſtatuti: Alſo Ruſhton came not to the Leaſe by Contract, but by compulſary means, as by Execution, &c. And here we are not in the Caſe of pleading, but of an Office where ſuch preciſe form is not requiſite: As if it be found by Office, that J. S. was ſeiſed in tail without ſhewing of whoſe gift the ſame is good; ſo an Indictment, De morte cujuſdem hominis ignoti, the ſame is good, but ſuch Endictment taken before the Coronor, is not good: And that a Leaſe for years may be extended, ſee 21 Aſſ. 6. If a man be indebted to the Queen, being a Leſſee for years, and afterwards before any Extent comes, ſells his term, the ſame cannot be extended after. And here it appears, That this Leaſe was to begin at a day to come, and that the Leſſee did enter before the day, by which he was a Diſſeiſor; and ſo he ſaid he had loſt his term. Tenant for the life of another is diſſeiſed, and dieth, he remains a Diſſeiſor, and the occupancy doth not qualifie ſuch diſſeiſin: And afterwards the Inquiſition for the incertainty aforeſaid was holden void, and a new Commiſſion was awarded.

See this Caſe vouched in C. 4 part, in Palmers Caſe.

Mich. 29 *Eliz.* In the Common pleas.

CLXVIII. Holland *and* Boins *Caſe.*

IN a Replevin by Thomas Holland againſt William Boins, who made Conuſans, as Bailey to Thomas, Lord Howard, and ſhewed, that the Prioreſſe of the late diſſolved Priory of Hollywell was ſeiſed of the Manor of Priors in the County of Hertford, and granted the ſame by words of Dedi & Conceſſi pro certa pecuniæ ſumma, to Thomas Audley, Chancellor of England, and his Heirs, who entered and died ſeiſed, and that the ſaid Manor, inter alia, deſcended to Mary, daughter and Heir of the ſaid Thomas Audley, who entred, and alſo died ſeiſed, by force whereof the ſaid Manor deſcended to the ſaid Thomas Lord Howard, &c. and ſhewed, that the ſaid Conveyance by the prioreſſe to Audley bore date 4 Novemb. 29 H. 8 and then enrolled in the Chancery. The Plaintiff in Barre of the Avowry, ſhewed, that after the making and enrolling of the ſaid Conveyance, the ſaid Prioreſſe Leaſed the ſaid land to Sir H. Parker for 99 years, and conveyed the ſaid land to him, and ſhewed farther, That the ſaid Conveyance ſpecified in the Conuſans was primo deliberatum, 4 Nov. 31 H. 8. Abſque hoc, that the ſaid Prioreſſe, the ſaid 4 Novembris, 29 H 8. dedit & conceſſit, the ſaid Manor to the ſaid Audley, upon which it was demurred in Law; and the Court was clear of opinion, That the averment of primo deliberatum,

against a Deed enrolled ought not to be reserved, for by the same reason it may be averred never delivered, and so upon the matter, Non est factum: And it was further objected, That bargain and sale by a Corporation is not good; for a Corporation cannot be seised to another use, and the nature of such Conveyance is to take effect by way of use in the Bargainee, and after the Statute to draw the possession to the use; But the Court utterly rejected that Exception as dangerous, for such was the Conveyance of the greater part of the possessions of Monasteries: And by Shuttleworth Serjeant, Although such a Corporation cannot take an Estate to the use of another, yet they may charge their possessions with an use to another.

Note, *Pasc.* 30 *Eliz.* it was adjudged for the Plaintiff in the Replevin; (*scil.*) the Conveyance of the Prioresse was not well pleaded; for it ought to be plead as a Bargain and Sale, and not as a grant: and Judgement was given accordingly.

Mich. 28 & 29 *Eliz.* In the Kings Bench.

CLXIX. Venables *and Serjeant* Harris *Case.*

1. C. 3 Leon. 185.

THe Case was, a Lease was made to A. and B. for their lives, the Remainder to Thomas Venables in tail, who 3 Eliz. was attainted of Felony; 23 Eliz. was a generall pardon: Thomas Venables 24 Eliz. levied a Fine, and suffered a common Recovery to the use of Harris Serjeant. An Office is found, Harris traverseth the Office, and upon that there is a demur. Leke argued, That traverse doth not lie in this Case: 4 H. 7. 7. where the King is entitled by double matter of Record, the party shall not be admitted to traverse, nor to his Monstrans de Droit, but is put to his Petition, which see, 3 E. 4. 23. in the Case of the Earle of Northumberland, where the Tenant of the King is attainted of Treason, and the same found by Office: See also 11 H. 4. in the Case of the Duke of Suffolk, and that is not helped by the Statute of 2 E. 6. cap. 8. For the words are untruly found by Office, but here the Office is true. By this Attainder, Thomas Venables is utterly disabled to do any Act; for by Bracton, a person attaint, shall forfeit Patriam, Regnum, & Hæreditatem suam: 11 H. 4. one was attainted of Felony, and before Office found, the King granted over his lands: Also he is not helped by the generall pardon; for before the generall pardon, he had a special pardon, so as the generall pardon non operatur. But the Justices said, The forfeiture did remain untill the generall pardon. Harris, contrary; And he put the Case of Sir James Ormond, 4 H. 7. 7. where the King is entitled by matter of Record, and the subject confesseth the Kings title, and avoids it by matter of as high nature as that is for the King, traverse in that case lieth: and if the King be entitled by double matter of Record, if the party doth avoid one of the said Records by another Record, he shall be admitted to his traverse; and so here we have the pardon, which is a Record, and that shall avoid the Record of the King: See 3 E. 4. 24. in the Earl of Northumberlands Case; and here the pardon hath purged the forfeiture, in respect of the offence: and he said, Tenant in tail being attainted of Felony, shall not lose his lands, but the profits onely, for he hath his Estate by the Will of the Donor, and there is a confidence reposed in him: as in Walsinghams Case, he cannot grant his Estate over: and see Wrothes Case; An annuity granted, pro Consilio impendendo cannot be granted over or forfeited, for there is confidence: And see Empsons Case, Dyer 2. and 29 Ass. 60. If the issue in tail be outlawed of Felony in the life of his father, and getteth his Charter of pardon in the life of his father, after the death of his father he may enter; but by Thorp, If the issue in tail getteth his Charter of pardon after the death of his father, then the King shall have the profits of the lands during the life of the issue: And the Case of

Cardinal

Cardinal Pool was debated in the Parliament, 27 Eliz. That he being Dean of Exeter, was ſeiſed of Lands in the right of his Church, and was attainted of Treaſon: It was holden, That he ſhould forfeit the profits of ſuch Lands: But admit, that by this Attainder the Land be forfeited, yet the party hath the Freehold until Office found: See Nicols Caſe on the Commentaries: and ſee alſo the Caſe of the Dutchy in the firſt Commentaries. And here the Pardon hath diſpenſed with the Forfeiture. Tenant of the King alieneth in Mortmain, before Office found, the King pardons it, this is good. The Lord Poynings conveyed all his Lands to Sir Adrian Poynings, who was an Alien, and afterwards is made a Denizen, and the King pardons him, and releaſeth unto him all his right in the ſaid Lands without any words of Grant; and it was adjudged, the ſame ſhall binde the King. And he ſaid, that he had found a good preſident, 14 H. 7. where a general Pardon before ſeiſure into the Kings hands was allowed, contrary after ſeiſure without words of Grant. See Br. 29 H. 8. Charter of Pardon 52. If a man be attainted of Felony, and the King pardons him all Felonies, & executiones eorundem, the ſame ſhall not ſerve for life and Land, if no Office be found, but it ſhall ſerve for the Goods without words of Reſtitution and Grant; for the King is entituled to them by Dut, lawry without Office, but the King is not entituled to the Lands until Office be found: See ibid. 33 H. 8. 71. The Heir intrudes, and before Office found the King pardons; now the Heir is diſcharged as well of the iſſues and profits, as of the Intruſion it ſelf, and alſo of Livery: But a Pardon given after Office is available for the Offence, but not for the iſſues and profits: And he cited the Caſe of Cole in the firſt Commentaries, where a Pardon was granted Pein betwixt the ſtroke and the death: See 35 H. 6. 1. 1 E. 4. 1. 8 Eliz. Dyer 249. Brereton's Caſe, 11 Eliz. Dyer 284, 285. Cardinal Pools Caſe.

Egerton, Sollicitor, to the contrary; This Traverſe is not good; for he that traverſeth, hath not made Title to himſelf as he ought, upon which the Queen may take Iſſue; for it is at the Election of the Queen to maintain her own Title, or traverſe the Title of the party. At the common Law, no Traverſe lay, but where Livery might be ſued; but that is helped by the Statute of 34 E. 3. cap. 14. but where the King is entituled by double matter of Record (as in our caſe he is) no Traverſe is allowed until 2 E. 6. cap. 8. And in ſuch caſe two things are requiſite: 1. That the Office be untruly found: 2. That the party, who is to be admitted to his Traverſe, have juſt Title or Intereſt of Eſtate of Freehold, &c. But in our caſe, the Office is confeſſed by the Traverſe to be true, although that the Conveyance be not truly found: Alſo Harris, at the time of the Office found, had not juſt Title, but an Intereſt came unto him long time after the Office found: Alſo the Traverſe is not good, for he traverſeth the matter of the Conveyance, which is not traverſable; for if the King hath Title, non refert quomodo, or by what Conveyance he hath it. As to the matter in Law, (ſcil.) Tenant in tayl in Remainder is attainted of Felony, if the King during the life of Tenant in tayl ſhall have the Freehold? and he conceived that he ſhould, for it ſhall not be in abeyance, and it cannot be in any other; for when he is attainted, he is dead as unto the King. The chief Lord cannot have it, for Tenant for life is alive, and alſo he in the Remainder in Fee, &c. the Donor ſhall not have it, for the Tenant in Remainder is not naturally dead, but civilly; and the Land cannot revert before the Tenant in tayl be naturally dead without iſſue: but if there were any other in whom the Freehold might veſt and reſt, then the King ſhould not have the Freehold, but onely the profits. So if the Tenant be attainted, the Lord ſhall have the Lands preſently; 3 E. 3. 4 E. 3. The Husband, ſeiſed in the right of his Wife, is attainted of Felony; the

King ſhall have but the profits, for the Freehold reſts in the Wife, and if the Lord entereth, the Wife ſhall have an Aſſiſe. And Tenant in tayl may forfeit for his life, as he may grant for his life: See Old N. B. 99. If Tenant in tayl, for life, Dower, or by the courteſie, be attainted of Felony, the King ſhall have the Lands during their lives; and after their deceaſes, he in the Reverſion ſhall ſue unto the King by Petition, and ſhall have the Lands out of the Kings hands; and there it is further ſaid, That the Lord by Eſcheat cannot have it, for the party attainted was not his very Tenant, nor he in the Reverſion, for the term yet endures. But now it is to ſee, if the Freehold be in the King without Office? and he conceived and argued, that it was: Where the King is entituled to an Action, there the King ought to have an Office, and a Scire facias upon it: as where the King is entituled to a Ceſſavit, Action of Waſte, &c. 14 H. 7. 21. where the Entry in caſe of a common perſon is neceſſary, there it is requiſite that there be an Office for the King: As if a Villein of the King purchaſeth Lands, or an Alien born, &c. ſo for a condition broken, Mortmain: And in ſome caſes, an Office is onely neceſſary to inſtruct the King how he ſhall charge the Officer for the profits, which may be ſupplyed as well by Survey, as by Office: as if the King be to take by deſcent, or as the caſe is here. And true it is, that a perſon attainted of Felony may during his Attainder purchaſe Lands, and yet he cannot hold it againſt the King: and it is clear, that by the common Law in ſuch caſes, the Land was in the King, but not to grant, for the Statute of 18 H. 6. was an impediment to it: but now that defect is ſupplyed by the Statute of 31 H. 8. cap. 20. So that now the King may grant without Office: See Doughties Caſe 26 Eliz. And in our caſe, an Office is not neceſſary to entitle the King, but for explaining of his Title: and ſee 9 H. 7. 2. The Lands of a man attainted of High Treaſon are in the King without Office; ſo where the Kings Tenant dyeth without Heir; or Tenant in tayl of the Gift of the King dyeth without iſſue: See Br. Office before the Eſcheator 34. and ſee 13 H. 4. 270. A man is attainted of Treaſon, the King before Office grants his Lands and Goods. Things which lie in Grant, as Advowſons, Rents, Remainder, ſuch things upon Attainder are in the King without Office. As to the general Pardon of 23 Eliz. he ſaid, That that doth not extend to this caſe; and that this intereſt of the Queen by this Attainder doth not paſs by that Pardon out of the Queen, ſo if the Queen had but a Right or a Title onely.

Popham, Attorny General; By this Attainder the Eſtate of him in the Remainder in tayl accrueth unto the Queen for the life of him in the Remainder; for by our Law, Felony is puniſhed by the death of the Offendor, and the loſs of his Goods and Lands for the examples of others, therefore nothing is left in the party: Tenant for life is attainted of Felony, the King pardoneth him his life, yet he ſhall have his Lands during his life, and he may diſpoſe of the ſame for his life: And ſo is it of Tenant in tayl, for he may forfeit all that which he hath, and that is an Eſtate for his life, which is a Freehold. If Lands be given to one and his Heirs for the term of the life of another, and the Donee be attainted of Felony, the King ſhall have the Land during the life of Ceſtuy que vie, for the Heir cannot have it, becauſe the blood is corrupt, and there is not any occupancy in the caſe: for 17 E. 3. the Juſtices would not accept of a Fine for the life of another, becauſe there might be an Occupant in the caſe: But for a Fine of Land to one and his Heirs for the life of another, they would take a Fine, for there is no miſchief of occupancy. Land is given to A. for life, the Remainder to B. for life, the Remainder to the right Heirs of A. who is attainted of Felony, B. dyeth, now the King hath the Fee executed. And here in our caſe, If the Tenant for life had been dead, no

Præcipe

Præcipe had lien againſt him in the Remainder being in poſſeſſion, but the party who hath right is to ſue unto the King by Petition. 4 E. 3. If one ſeiſed of Lands in the right of his Wife for life be attainted, the King ſhall have exitus & proficua: but he conceived that Caſe not to be Law: For ſee F. N. B. 254. D. The Husband ſeiſed in the right of his Wife in Fee, is outlawed for Felony, the King ſeiſeth, the Husband dyeth; now ſhall iſſue forth a Diem clauſit extremum, the words of which Writ in ſuch caſe are, Quia A. cujus terr. & tenement. quæ ipſe tenuit de jure & hæreditate M. uxoris ſuæ adhuc ſuperſtitis occaſione ejuſdem Utlagar in ipſum pro quadam Felonia unde indictatus fuit, &c. in man. Domini H. patris noſtri exiterunt, &c. therefore the King had not the iſſues onely, but alſo the Lands: See to the ſame purpoſe the Regiſter 292. b. Stamford Pleas Corona 186, 187. affirms, That Tenant in tayl being attainted of Felony, ſhall forfeit his Lands during his life. And he ſaid, that the Eſtate of Thomas Venables was in the King without Office not to grant, for that is reſtrained by the Statute of 18 H. 6. but it is in him before Office, ſo as he who hath right ought to ſue to the King by Petition, if he will have his Land: yet he conceived, that before the Statute of 18 H. 6. the King might grant the Land before Office, as it appeareth by Thirning, 13 H. 4. 278. who was before the ſaid Statute: So if the Kings Tenant makes a Leaſe for years, the Remainder over to another in Fee, who dyeth without Heir; the Remainder is in the King without Office, becauſe a common perſon in ſuch caſe cannot enter, but a claim is ſufficient, and therefore it ſhall be in the King without Office. As to the Pardon, he ſaid, That it doth not extend to this Eſtate, for this is a Freehold, ergo, not within the Pardon: As if the Kings Tenant be attainted of Felony, and the King pardons him all offences, and all things which he may pardon, theſe words ſhall not go nor extend to Freeholds, but onely unto perſonal matters, and ſuch puniſhments and pains which do concern Chattels. But it may be objected, That by this Pardon, Title of Quare Impedit, and Re-entries for Conditions broken are excepted; and therefore if they had not been excepted, they had been remitted by the Pardon; and therefore this Pardon ſhall extend to Inheritances and Freeholds: As to that, I ſay, That ſuch Exceptions were not in uſe in the time of H. 4. and yet Inheritances and Freeholds were not taken to be within ſuch Pardons, and ſuch Exceptions did begin 5 Eliz. And he ſaid, he had been of Counſel in ſuch caſes where it hath been taken, that ſuch Pardons did not extend to Freeholds: As an Abbot was diſſeiſed, and afterwards during the Diſſeiſin the Abby is diſſolved; the King makes ſuch Pardon, the ſame doth not transfer the Right of the King, and in that Pardon are divers Exceptions of Goods and Chattels in many caſes, and therefore it cannot be intended that the Pardon doth extend to Freeholds. And ſee the ſaid Act of Pardon: The Queen grants all Goods, Chattels, Debts, Fines, Iſſues, Profits, Amerciaments, Forfeitures, Sums of Monies; which word [Forfeiture] ſhall be intended of a perſonal Forfeiture, & non aliter, for it is coupled with things of ſuch nature. And as to the Traverſe, he ſaid, It did not lie in this caſe; for the Office is not untrue, but true in ſubſtance, although void in circumſtance: And alſo the King here is entituled by double matter of Record, (ſcil.) the Attainder and the Office: and he ſaid, That the Statutes of 34 and 36 E. 3. which gave Traverſe, are to be intended of Offices found virtute Officii, and not virtute Brevis, for then Eſcheators were very troubleſom: And the Statute of 2 E. 6. doth not give Traverſe, but where the Office is untruly found; as if Tenant of the King be diſſeiſed, and the Diſſeiſor be attainted, the Queen ſeiſeth the Land: Now the Diſſeiſee hath not remedy by Traverſe upon the Statute of 2 E. 6. but is put to his Monſtrans de Droit, for the Office is true: But if I be Tenant of the

King,

King, and ſeiſed of Land accordingly, and it was found that J. S. was ſeiſed of my Land, and attainted, &c. whereas in truth he had not any thing in my Land, there Traverſe lieth, for the Office is falſe; and ſo in our caſe, for the Traverſe it is at the common Law: and it is true that Venables was ſeiſed.

Coke to the contrary; and he ſaid, That by the Attainder the Queen hath gained but a Chattel; and that notwithſtanding this forfeiture, if Venables had been in poſſeſſion, a Præcipe ſhould be brought againſt him: And where it hath been ſaid by Mr. Attorny, That the Writs ſet down in the Regiſter are the beſt Expoſitors of our Law, the ſame is not ſo; for the Regiſter ſaith, That Waſte lieth notwithſtanding a Meſn Remainder, which is not now Law, but it hath been clearly ruled to the contrary: and ſee accordingly 50 E. 3. the Regiſter therefore and the Writs are ſubject to the Judgment of our Law; and the Writ of Diem clauſit extremum is not to the contrary; for I confeſs, that in ſuch caſe the Land ſhall be ſeiſed into the hands of the King, but the King ſhall not have but a Chattel therein: It hath been argued, It may be granted, therefore it may be forfeited; Nego Conſequentiam: for a man ſeiſed in the right of his Wife, may grant, but not forfeit: Gardian in Socage may grant, but not forfeit; the Huſband may grant a term for years, which he hath in the right of his Wife, but he cannot forfeit it. A woman Inheritrix taketh a Husband, and afterwards is attainted of Felony, the King pardons him, they have iſſue, the Husband ſhall be Tenant by the courteſie, which proveth, that the King hath not the Freehold by that Attainder. Before the Statute of Weſt. 2. Tenant in tayl, poſt prolem ſuſcitatum, might forfeit his Lands, but now the Statute hath ſo incorporated the Eſtate-tayl to the Tenant in tayl, that it cannot be deveſted, even a Fine levyed by him ipſo jure nullus, although as to the poſſeſſion it be a Diſcontinuance; and that is the reaſon wherefore Tenant in tayl ſhall not be ſeiſed to anothers uſe. See Stamford 190. The Husband ſeiſed in the right of his Wife is attainted of Felony, the King ſhall have the profits of the Lands of the Wife during the life of the Husband, &c. So if Tenant in tayl be attainted of Felony, and that is but a Chattel in the Lands of the Wife, and alſo in the Lands of the Tenant in tayl: and if the poſſeſſions of a Biſhop be ſeiſed into the Queens hands for a Contempt, in ſuch caſe the Queen hath the poſſeſſion, and not the profits onely: the ſame Law of the Lands of Tenant in tayl, or for life, being attainted of Felony: ſo of Seiſure for Alienation without licenſe, or of the poſſeſſions of Priors, Aliens. See Brook Reſeiſer 10. So where the Seiſure is for Ideocy. And he ſaid, That in the principal Caſe nothing is in the King until Office: and as to the Caſe of 13 H. 4. 6. he confeſſed the ſame; for at that time many, and amongſt them Lawyers and Juſtices, were attainted by Parliament, and ſo was Sir John Salisbury, whoſe Caſe it was; and their Lands by Act of Parliament given expreſly to the King: and therefore I grant that their Lands were in the King before Office. Tenant in Fee of a common Lord is attainted of Felony, his Lands remain in him during his life until the Entry of the Lord, and where the King is Lord until Office be found: but in the caſe of a common perſon, after the death of the perſon attainted, they are in the Lord before Entry, and in the caſe of the King before Office, for the miſchief of abeyances. And ſee the Lord Lovels Caſe, 17 and 18 Eliz. 485, 486. Plow. where it is holden, That upon Attainder of Treaſon by Act of Parliament, the Lands were not in the King without Office in the life of the party attainted, upon the words of the Act, ſhall forfeit. See Stamford Prerogat. 54, 55. acc. He ſaid, That this intereſt which came unto the King by this Attainder, is but a Chattel, and then it is remitted by the Pardon; and ſo he conceived, if it be a Freehold: For the words of the

general

general Pardon are large and liberal, [Pardon and releaſe all manner of Treaſons, &c. and all other things, Cauſes, &c.] and here Forfeitures are pardoned; and this word [things] is a tranſcendent, &c. and although it be a general word, yet by the direction of the Act of general Pardon it ought to be beneficially expounded and extended, as if all things had been ſpecially ſet down: Alſo the words are, [Pardon them and their Heirs.] therefore the Pardon extends to Inheritance, for otherwiſe there is no uſe of that: And he conceived, That by the firſt branch of this Act, that the ſame extends to Inheritances, and to acquit the Lands of all incumbrances, for every Offence not excepted, for there is the word [Heirs,] and the third branch concerns onely Chattels, and that is by the word of [Grant,] where the firſt is by words of acquittall: See 33 H. 8. br. Charter of Pardon 71. Tenant of the King dyeth ſeiſed, the Heir intrudes, Office is found; by Pardon of Parliament all Intruſions are pardoned; in that caſe the Offence is pardoned, but not the iſſues and profits of the Lands; but by a Pardon before all is pardoned. And here in our caſe the Office is voyd; for the Statute makes all Precepts, Commiſſions, &c. voyd, being awarded upon ſuch forfeiture. See alſo in the ſecond branch, Vexed or inquieted in Body, Goods, or Lands: and ſee alſo amongſt the Exceptions, That perſons ſtanding indicted of wilful Murder, and Forfeiture of Goods, Lands, Tenements, grown by any offence by ſuch perſon: By which he ſaid, that if ſuch Exception had not been, the Land of ſuch perſon, if he had been attainted upon ſuch Indictment, ſhould be forfeited: As to the Traverſe, he ſaid, That becauſe the Office is true, our Plea is in the nature of Monſtrans de Droit, although it concludes with a Traverſe: We vary from the Office in number of the perſons, and in the day of Feoffment, and every circumſtance in caſe of the King is to be traverſed, and our Plea in ſubſtance confeſſeth and avoydeth the Offence. Although that here the King be entituled by double matter of Record, (ſcil.) the Attainder and the Office; yet one of the ſaid Records, (ſcil.) the Attainder, is diſcharged by another Record, (ſcil.) the Pardon, and then but one Record remains, (ſcil.) the Office, and therefore our Traverſe well lieth. And he ſaid, that by the common Law there was a Traverſe; as where it was found by Office, that the Leſſee of the King had committed Waſte, or had ceſſed for two years; and that in ſuch caſe the Leſſee and Tenant, in an Action brought againſt them, may traverſe the Offence; therefore there was a Traverſe at the common Law, where the King was entituled by ſingle matter of Record: So upon Office finding Alienation without Licenſe, there was a Traverſe by the common Law: See Traverſe in ſuch caſe in the Caſe of William de Herlington, 43 Aſſ. 28. See Br. Traverſe of Office 54. Petition is by the common Law, and Traverſe by the Statute: Frowick in his Reading. See Stamf. Prerogat. 60. That Traverſe in caſe of Goods was at the common Law, but for Lands by Office, by 34 E. 3. 14. for before the remedy was by Petition. See C. 4. part. the Sadlers Caſe 55, 56. Traverſe was at the common Law concerning Freehold and Inheritance, but that was in ſpecial Caſes, (ſcil.) when by the Office the Land is not in the Kings hands, nor the King by that is in poſſeſſion, but onely by the Office is entituled to an Action, and cannot make a Seiſure without Suit, there in a Scire facias brought by the King in the nature of ſuch Action to which he is entituled, the party may appear to the Scire facias, and traverſe the Office by the common Law. It was adjourned.

Mich.

Mich. 29 *Eliz.* In the Kings Bench.

S. C. Cro. Eliz. 73.

CLXX. Scott *and* Scotts *Caſe.*

IN a Replevin, betwixt Scott and Scott, the Caſe was, George Scott, 2 H. 8. being Tenant in tail of certain lands, ſuffered a common Recovery to the uſe of his laſt Will; and 15 H. 8. made his Will, by which he did declare, That the Recoverors ſhould make a good and favourable Leaſe to Hugh Scott his younger brother: and 25 H. 8. they make a Leaſe of the ſame land to the ſaid Hugh for 199 years, according to the Will of the ſaid George Scott, rendring Rent, 11 l. 6 s. 8 d. payable at the Feaſt of the Annunciation and S. Michael. by equall portions, and that to the Recoverors, their Heirs and Aſſignes, and there was a Covenant, that after the death of the Recoverors, the ſaid Rent ſhould be paid to Ceſtuy que uſe, his Heirs and Aſſigns, any thing in the ſaid Indenture notwithſtanding. Proviſo, That if the Leſſee make his Heir male his Aſſignee of that term, that then he ſhall pay the ſaid Rent to the Recoverors, their Heirs and Aſſigns, and the Leſſee ſhall not pay the Rent to the Heirs of Ceſtuy que uſe, upon which a Diſtreſſe is taken, and thereupon a Replevin brought. Drew argued for the Plaintiff: When a Condition is created, the Law ſaith, That it ſhall be taken and conſtrued favourably in the behalf of him who is to perform it: As if one be bounden to appropriate ſuch a Church to ſuch a houſe before ſuch a day at his own coſts, and the Obligor grants a Penſion out of the ſaid Parſonage, and afterwards appropriates the ſaid Church, it was holden that the Condition was well performed, 3 H. 7. 4. A Leaſe for years upon condition, to ſcowre the Ditches, if the Leſſee ſcowreth them once, it is well enough: And as to this word Proviſo, It is to ſee, If here it be a word conditionall: In ſome Caſes, this word Pro, makes a Condition, as 45 E. 3. 8. Grant of a Ward, pro bono ſervitio, if the Grantee departeth out of his ſervice, the Grant is void: So if an Annuity be granted unto a Phiſician pro conſilio impendendo, the ſame is a Condition, 41 E. 3. 6. For the Grantor hath not means to compell the Grantee to give his Counſel; but in ſome Caſes, this word Pro, doth not make a Condition: As if before the Statute of Weſt. 3. Land was given pro homagio ſuo, there, if the Homage be not done, the Feoffor could not re-enter, but he ought to diſtrain. And I conceive, that in our Caſe, Proviſo doth not make a Condition. 7 H. 6. 44. A Feoffment in Fee with Warranty, Proviſo, that the Feoffee ſhall not vouch: So a Grant of a Rent-charge, Proviſo, that the Grant ſhall not extend ad onerand. perſonam of the Grantor; for here the Proviſo is rather an Exception then a Condition: A Leaſe for years without impeachment of Waſt, Proviſo, that he ſhall not do voluntary Waſt, the ſame is a Qualification of the liberty for doing Waſt. Grant of a Pannor, Proviſo, that it ſhall not extend to wood growing upon the Pannor, the ſame is an Exception, not a Condition. See the Biſhop of Yorks Caſe, 5 Eliz. Dyer 222. The ſaid Biſhop made a Leaſe for certain years of certain lands, Proviſo, quod tempore vacationis, the Rent ſhall be paid to the Chapter, It was holden that the Proviſo was not a Condition. And here in this Caſe, the Will of George Scott was, That the Recoverors ſhould make to the ſaid Hugh, a favourable Leaſe, which cannot be, if it be a conditionall Leaſe: Another point was; becauſe the Rent is not well demanded; for he hath demanded the whole Rent of the year, whereas but half a years Rent was only due. Coke, contrary: where the Proviſo is parcel of one ſentence which contains a Covenant, or abridgeth the Covenant, there it ſhall not amount to a Condition, but to an Exception, as a Grant of a Rent-charge, Proviſo, that

he

he ſhall not charge the perſon, abridgeth the force of the Grant: ſo a Leaſe without impeachment of Waſt, Proviſo, that the Feoffee ſhall not do voluntary Waſt, the ſame abridgeth the liberty; But in our Caſe, this Proviſo makes a Condition, and not a Qualification of the ſentence, or of any Covenant contained in the ſentence, nor doth it participate altogether with the ſentence, but ſtands ſubſtantive, for it was a full ſentence before: A Feoffment in Fee with Warranty, Proviſo, that when he is impleaded, he ſhall not vouch J. S. the ſame is a good Condition, for J. S. is a ſtranger: contrary, that he ſhall not vouch the Feoffor,: And a Proviſo never makes a Covenant, and therefore it ſhall be either a Condition, or void. And he ſaid, That by the deviſe, Hugh Scott had a Leaſe without any Leaſe to be made by the Recoverors. As unto the demand of the whole Rent, where but half a years Rent was due, the ſame is good enough. And ſo was it adjudged in a Caſe betwixt Andrews and the Lord Cromwell; for he is at his perill to pay the one moyetie, and in as much as he denieth the whole, he denieth every part. It was adjorned.

Mich. 29 *Eliz.* In the Kings Bench.

CLXXI. Hawkins *Caſe.*

ONe Hawkins was ſeiſed of three Meſſuages in Bury in his Demeaſne as of Fee, and had iſſue, Robert, Chriſtian, and Joan; and deviſed all his ſaid Meſſuages to his wife for life, the remainder of one of the ſaid Meſſuages to his ſon Robert and his heirs; the remainder of another of his ſaid Meſſuages to his daughter Chriſtian and to her heirs, and the remainder of the third Meſſuage, to Joan and her heirs. And further, by his Will deviſed, That if any of his ſaid iſſues die without iſſue of his body, that then the other ſurviving ſhall have totam illam partem, &c. betwixt them equally to be divided. The Deviſor dieth, the wife of the Deviſor dieth, Joan dieth, having iſſue, Robert dieth without iſſue, Chriſtian entreth into all the houſe of Robert, and dieth, and her huſband holds in as Tenant by the Curteſie. Coke, The ſurviving childe ſhall have the whole, and the iſſue of Joan ſhall have nothing; and he ſaid, That by this Deviſe, they have an Eſtate in tail, for the Fee doth not veſt in any of them; for it is written, Who ſhall ſurvive: But when one overlives, he ſhall have in Fee, for theſe words, totam illam partem, go to the whole Eſtate, as well as to the whole Land. I deviſe my Land wholy to one, he hath Fee thereby: And he ſaid that the three Deviſees have Fee-tail, and Fee expectant each ſeverally as to the Meſſuage to him limited. Golding, contrary; Each hath an Eſtate tail in the houſe deviſed to him, and but an Eſtate for life, expectant upon the death of the other without iſſue, for there are no words by which it may appear what Eſtate he ſhall have by the ſurvivorſhip. I grant the Caſe which Perkins denies, but Littleton affirms (ſcil.) A Deviſe to one of lands in perpetuum; for there the intent appeareth; But where there are not words of Inheritance, nor words amounting to ſo much, then it ſhall be but an Eſtate for life: And as to theſe words, totam partem illam, the ſame is all one as if he had ſaid, partem illam without the word totam. And alſo he ſaid, That where one only ſurvives, no further Eſtate veſts; for there ought to be two to take by the ſurvivor; for the words are, Equally to be divided betwixt them, And then if it cannot accrue by ſurvivor, then it ſhall deſcend; and if it had accrued to two by the ſurvivor, they ſhould be thereof Tenants in common, not Joynt-tenants by reaſon of theſe words, Equally to be divided. Clench, Juſtice, The words, Totam illam partem, go to the houſe, and not to the Eſtate in it: Shute, Juſtice, accordingly: and he ſaid, If both daugh-

ters had ſurvived, they ſhould have Fee in the houſe of Robert, but not by the Will, but by deſcent in coparcinary: Alſo when two are dead, the ſon and one daughter, then it cannot be divided, therefore the Will as to that is void, and then the common Law ſhall take place, and put the houſe to the iſſue of one daughter, and of the other daughter ſurviving. Gawdy, Juſtice, Here is but an Eſtate for life in the ſurvivor; It hath been objected, That then having but an Eſtate for life, the ſame Eſtate is drowned by the deſcent of the Fee-ſimple, ſo as now the Eſtate limited by the Will, is void; To which it may be anſwered, That although now, upon the matter it be void, yet, Ab initio, it was not ſo; for it became void by matter of later time, (ſcil.) by the deſcent of the Fee-ſimple; for if one of the daughters had died without iſſue before the death of Robert, ſo as the houſe of ſuch daughter ſhould have come to the ſaid Robert and the other ſiſter, there is no coparcinary, for the ſon hath all the Fee, and the moyetie of the ſame is executed, and the other moyetie expectant, and the ſiſter hath a moyetie for life, and then the Deviſe not void: Alſo here are not two ſurvivors, ſo nothing is to be divided, and therefore the Law ſhall ſay, that the houſe of Robert is deſcended, (ſcil.) the Fee of it to the daughter of Chriſtian and Joan, and ſo Judgement was given againſt the husband, who claims to be Tenant by the Curteſie of the whole Meſſuage.

Paſc. 27 *Eliz.* In the Common Pleas.

CLXXII. Wye *and* Throgmortons *Caſe*.

IN Debt upon a Bond by Wye, againſt Throgmorton, The Condition of the Obligation, was to perform Covenants within a pair of Indentures; And the Covenant wherein the breach was aſſigned was, That if R. W. brother of the Plaintiff, ſhould ſay, Make aſſurance of ſuch a Manor to the Defendant, as the Councel learned of the ſaid Defendant ſhould adviſe, Then if the Defendant payes unto the Plaintiff 50l. the Obligation to be void; The Defendant by advice of Councel, demanded a Releaſe with Warranty, &c. And by Periam and Windham, The ſame is not any Aſſurance, but a means to recover in value. Anderſon, contrary: That it was a Collaterall Warranty, &c.

Hill. 28 *Eliz.* In the Kings Bench.

CLXXIII. Cropp *and* Hambledens *Caſe*.

IN Treſpaſſe by Cropp againſt Eraſmus Hambleden, upon the ſpeciall Verdict, the Caſe was; That one Martin Haſtings was ſeiſed of the lands, where, &c. in the right of his wife, for the life of the wife; and that they both did Leaſe unto the Defendant for years, rendring Rent, payable at the Feaſt of St. Michael, and the Feaſt of the Annunciation, &c. with clauſe of re-entry, if the Rent be behinde, by a Month after any of the ſaid Feaſts: and after the Feaſt of St. Michael, 26 Eliz. and before the Month expired, the Leſſee, the now Defendant, ſent his ſervant unto the houſe of the Leſſor, for to pay to him the Rent then due; the ſervant went unto the houſe of the Leſſor, and there aſked for him, to whom it was anſwered by one Mary Briggs, daughter of the wife of the Leſſor, who there dwelt in the ſaid houſe with her mother, that the Leſſor was not at home, for which the ſaid ſervant delivered the ſaid Rent to the ſaid Mary, requiring her to deliver the ſame over to the Leſſor, upon his return to the houſe, in the name of his ſervant;

Mary

Mary reſerved the ſaid Rent, and upon the retorn of the Leſſor, at his houſe, told him all the matter aforeſaid, and that the ſervant of the Leſſor, the Defendant, had required her to tender the ſaid Rent to the Leſſor, in the name of the Defendant, and thereupon offered and tendered to him the ſaid Rent, and the Leſſor refuſed it. And the Jury found, That the third half year before the tender mentioned before, the Leſſor commanded the ſaid Mary to receive the Rent then due, who did accordingly, and that the next half year then following, the ſaid Mary did receive the ſaid Rents, without commandment of the Leſſor, but after the Leſſor agreed unto it, and that the immediate half year before this tender in queſtion, the Defendant paid the Rent then due, to the Leſſor himſelf, who received it; And it was the opinion of Wray, chief Juſtice, That this tender was good, and it is not like unto the caſe of an Obligation; for there the Obligee cannot have an Action of Debt before the laſt day: but here the Leſſor might have diſtrained, or have had an Action of Debt before the Month expired, and ſo the Leſſor is bound by this tender; and by Gawdy, Juſtice, This tender cannot be ſaid a tender by a ſtranger, for here Mary came in privity of the ſervant of the Leſſee, and as it is found by verdict, Mary tendered it to the Leſſor, as being requeſted by the ſervant of the Leſſee: And afterwards, upon conſideration had betwixt the Juſtices themſelves; the Juſtices, viz. Clench, Gawdy and Wray, (for Shute was then ſick) it was clearly reſolved againſt the Plaintiff, and that the ſaid tender, as it is found in the Verdict, is a good and ſufficient tender; and the Lord Wray delivered the reaſon, as before, and further ſaid, That if the ſaid Rent had been reſerved payable at the Feaſts aforeſaid, or within a Month after each of them, there the tender as above, had not been good, nor ſhould binde the Leſſor; for in ſuch caſe the Leſſor could not diſtrain, or have an Action of Debt for the ſaid Rent before the Month expired. And this is caſe of extremity, and deſerves no favor, and here is no miſchief to the Leſſor, for he might have had his Rent in due time if he would, and his captious refuſall ſhall not avail him; And Judgement was given accordingly.

Trin. 33 *Eliz.* In the Common Pleas.

CLXXIV. Boſtock *and* Coverts *Caſe*.

BOſtock and his wife brought a Writ of Dower againſt Covert, ſon and heir of her former huſband, who pleaded, That the huſband of the Demandant was ſeiſed of lands, amounting to the number of 300 acres; and held the ſame by Knights-ſervice, and died ſeiſed; after whoſe death, by vertue of the Statute of 34 and 32 H. 8. he entred into 100 acres of the ſaid lands, as the third part of the ſaid lands deſcended, and held the ſame in ſeveralty, being the third part of the cleer yearly value of the whole diſcharged of Dower; and that the wife ought to have all her Dower out of the two parts deviſed. And Anderſon ſaid, That the Plea was not good; for the heir who will take advantage of the Statute in that point, ought to enter generally as Tenant in common with the Deviſee, and then in a Writ of Dower it is a good Plea: ſo if after his entry as Tenant in common, Partition be made betwixt him and the Deviſee, ſuch a Plea is good; but here he hath entred ſeverally into a third part, diſtinct from the reſidue, and ſo hath ouſted the Deviſee of a third part ſeverally; for which cauſe he cannot have advantage of this Plea: To which, the reſt of the Juſtices, Non contradixerunt.

Pasc. 37 *Eliz.* In the Exchequer.

CLXXV. *Sir* John Southwels *Case.*

SIr John Southwel of the County of Lancaster 7 Julii, 19 Eliz. made a Conveyance of his Lands to divers Feoffees and their Heirs, upon condition, that they should finde him and his wife, and so many persons in his house, &c. preferre his daughters in marriage, pay his debts, &c. And if there fell out at the years end upon accompt made by the Feoffees any surplusage, that then at the end of every such year, they should answer such surplusage as should then remain in their hands unexpended of the Rents and profits of his said lands; with clause of Revocation, &c. Afterwards, the said Conveyance being in force, came the Statute of 23 Eliz. concerning Recusants; upon which Statute, the said Southwel is now endicted; and afterwards upon a Commission issuing out of the Exchequer to the Sheriff of Lancaster, to enquire of the lands of the said Southwel, although against the said Conveyance it was given in Evidence, That after the said Conveyance, the said Sir John Southwel had granted Trees from off the said lands, and had received Fines and Incomes for Leases, &c. yet the Jurors charged to enquire, would not finde that the said Sir Joh. Southwel had any lands, &c. And by speciall command from the Queen, it was referred out of the Exchequer, to all the Judges of England, If the lands of the said Sir John Southwel conveyed as aforesaid, were subject to the said Statute, and the penalties thereof. And upon a great deliberation, it was by them all resolved and agreed, That notwithstanding the said Conveyance, the said lands were liable to the said Statute. And as to the Jurors, who against the Evidence given to them for the Queen, gave their Verdict (ut supra) Proces was awarded against them out of the Court of Exchequer, for to appear before the Lord Treasurer and the Barons. And for their said contempt, they were committed to the Fleet, and each of them fined 50 l.

Trin. 27 *Eliz.* In the Exchequer.

CLXXVI. Moore *and* Savills *Case.*

IN an Ejectione firmæ, by Moore against Savel, the Case was, That Tenant in tail Leased the land to the father, mother, and son for their lives, by Indenture, In which it was comprehended, That for as much as the Lessor is but Tenant in tail, and so cannot by Law limit these Estates by way of Remainder, but joyntly in possession; and his intent was, That because this Lease was procured and obtained at the speciall suit, and costs and charges of the father, That the said son should suffer his father, and after him his mother, to take the profits of the said lands demised, and to occupy and hold the said lands to their only profit without interruption of the said son, notwithstanding his joynt Estate in possession with them. Provisum igitur est, That if the said son shall challenge, claim, demand, or take any profits of the lands so demised, or enter into the same, during the life of his said father or mother, That then the Estate to him limited by the said Indenture should cease, and be utterly void. And it was the cleer opinion of the whole Court, That this Condition and Proviso was utterly void, for it is contrary to the Estate limited before; as the case cited by Coke at the Bar. If I Lease to you my lands for 20 years, Proviso, that you shall not occupy the same the two first years, the same Proviso is void and contrary, and repugnant to the Estate.

Mich.

Mich. 28 *Eliz.* In the Star-Chamber.

CLXXVII. *Lord* Cromwell *and* Townſends *Caſe*.

HEnry Lord Cromwel, Exhibited a Bill into the Star-Chamber, againſt Roger Townſend, Eſq. for that the ſaid Roger Townſend, in an Action betwixt James Taverner Plaintiff, and James Cromwel Farmor, of the ſaid Lord Cromwel Defendant, in Treſpaſſe, in the favor and unlawfull maintenance of the ſaid Taverner, did procure a partiall Jury to be returned. And upon the hearing of the Cauſe, the matter given in Evidence was, That the ſaid Taverner was a Copiholder of the ſaid Lord Cromwel, and that the ſaid Lord Cromwel, pretending that the ſaid Taverner had forfeited his Copihold, cauſed the ſaid James Cromwell to make an Entry, in the right of the ſaid Lord, upon the ſaid Taverner; upon which Entry, Taverner brought an Action of Treſpaſſe againſt the ſaid James Cromwel, In which Action the parties were at Iſſue upon the forfeiture. And before any Venire facias iſſued forth, Taverner hearing that one Steward, who was Bailiff of the Franchize, under the Earl of Arundel, and who ought to make the Pannel, &c. was purpoſed to have made the ſaid Pannel not duly; viz. to return therein, great Gentlemen of the County, who were Lords of Mannors, in favour of the ſaid Lord Cromwel went unto the ſaid Roger Townſend, who was then one of the principall ſervants and agents of the ſaid Earl, and ſhewed to him, that if thoſe great perſons, and Lords of Mannors be returned for the triall of that iſſue, peradventure they would not ſo eaſily appear for the expedition of the parties, as people of leſſer condition; and alſo many of them being Lords of Mannors, and having cuſtomary Tenants, and therefore not indifferent to try that Iſſue, and prayed his Order to the ſaid Steward, for the making of an indifferent Pannell; where, upon a conference with the ſaid Steward for the making of an indifferent Pannel, and ſhewing to him, that the making of the ſaid Pannel was not convenient, or any equall courſe to return, Knights, Eſquires, or Lords of Mannors, but rather ſuch ſufficient perſons, for the greater expedition of Juſtice, and indifferency of the triall; And afterwards the ſaid Taverner exhibited a Petition, ſhewing all the ſpeciall matter, and praying him to give Order for the making of an indifferent Pannel for the triall of that Cauſe, which Petition was delivered to the ſaid Earle by the ſaid Townſend, in the name of the ſaid Taverner. Upon which the Earl did referre the ſaid matter to three of his chiefeſt agents and Councellors, i. Dickſey, Townſend, and Carrel, and delivered to them the book of Freeholders within the ſaid Franchize, who, according to their Commiſſion made a Pannell which was returned; and the Jury paſſed with the ſaid James Cromwel in the right of the ſaid Lord: And if this intermeding of Townſend with this matter, as aboveſaid, &c. eſpecially his conference with the Bailiff, be maintenance or not, was the Queſtion. And by the Lord Anderſon and the Lord Wray, chief Juſtices, It was delivered for Law, That becauſe the ſaid Townſend was in manner a ſervant of the ſaid Earl, who had return of Writs, and one of his principall Councellors and agents, and hearing, Ex inſinuatione, of the ſaid Taverner, the miſdemeanor of the Bailiff of his Lord could not do better, then to ſhew to the Bailiff his duty, for it concerned the honor of his Lord, and alſo his Inheritance in the Franchize; But if the ſaid Townſend had been a meer ſtranger to the ſaid Earl, ſo as no ſuch privity had been betwixt them, it had been cleerly maintenance in Townſend; as it was lately adjudged in this Court, in the Caſe of one Gifford; Giffords Caſe.
where the parties being at Iſſue, and a Venire facias was to the Sheriff to

return

retorn a Jury, a ſtranger wrote to one of the Jurors who was returned in the Pannel, praying him to appear at the day, and to do in the Cauſe according to his Conſcience; and that was adjudged Maintenance. And afterwards, upon the full hearing of the cauſe, the ſaid Townſend, by the ſentence of the ſaid Court, was acquitted of every Maintenance, with great allowance and approbation of many Lords of the Councel there preſent: Bromley Cancellario tantum exclamante.

33 *Eliz.* In the Exchequer.

CLXXVIII. *Sir* Moil Finches *Caſe.*

THe Caſe was this; The King and Queen, Philip and Mary, leaſed for ſeventy years for certain Rent payable at the Feaſts of St. Michael and the Annunciation; Proviſo, that if the Rent be behinde, and not payd by the ſpace of forty days after any of the Feaſts aforeſaid, that the Leaſe ſhall ceaſe and be voyd. At Mich. 9 Eliz. the Rent was not payd according to the Proviſo, but a Month after the ſaid forty days it was payd, and Acquittance given for it; and ſo the Rents due after unto 30 Eliz. were duly payd, and Acquittances given for the ſame. The Queen gave and granted the Reverſion in Fee to Sir Thomas Henage, &c. and after it was found by Office that the Rent was arrear, ut ſupra: Sir Thomas Henage entered, and leaſed for years to Sir Moil Finch, who being ejected, brought Quo minus in the nature of an Ejectione Firmæ, &c. It was argued by Coke, That this Leaſe upon the matter aforeſaid is avoydable by the Patentee, and that without Office; for the concluſion of the Proviſo is not, that the Queen ſhall re-enter, but that the Leaſe ſhall ceaſe and be voyd: and the Queen is not driven to demand her Rent, as in ſuch caſe a Subject is tyed. And he compared it to the Caſe of a common perſon; If a common perſon leaſeth for years, upon condition, that if the Leſſee doth not build upon the Land demiſed a Houſe within a year after, that the Leaſe ſhall be voyd, and afterwards grants the Reverſion to a ſtranger: the Grantee ſhall have advantage of this Condition, be it broken before or after the Grant; for the Leaſe in ſuch caſe is voyd, not onely voydable; and the cauſe is, becauſe the Condition is collateral: which ſee 11 H. 7. 17. A Leaſe for years is made upon condition, that if the Leſſee doth not go to Rome before ſuch a day, that the Leaſe ſhall be voyd; the Leſſor grants the Reverſion over, the Leſſee attorns, and doth not go to Rome within the term appointed, the Grantee may re-enter; contrary, if the concluſion of the Condition had been by way of re-entry, for then it ſhould run in privity by the common Law: But where a Leaſe with ſuch Condition was made for life, with this concluſion of the Condition, that the Leaſe ſhall be voyd, the Grantee ſhall not take advantage of that by the common Law, for there the Eſtate is not voyd until re-entry, for there is a Freehold which ought to be avoyded by Entry: But in our caſe the Condition is upon the matter collateral, for no Demand is requiſite to take advantage of the Condition. And he ſaid, It is a general Rule, where in the caſe of a common perſon an Eſtate may be deveſted without Entry, there in the caſe of the Queen there needs not any Office; but here in our caſe, if it had been the caſe of a common perſon, the Eſtate ſhould be deveſted without Entry, therefore in the caſe of the Queen without Office: See Stamford for the Major Propoſition 55. but it doth not veſt to have Treſpaſs before Entry: and he vouched the Caſe of Browning and Beſton, Plow. 136. where ſuch Leaſe, after ſuch Condition broken, is meerly voyd and diſſolved. And he ſaid, that it was the Opinion of the Juſtices of the Common Pleas, now late,

That

That a Releaſe to ſuch Leſſee, after the condition broken, nihil operatur; for after the Condition broken he is but Tenant at ſufferance; and a Leaſe for years, being but a Chattel, may begin without ceremony, and end without ceremony: 2 H. 7. 8. If the King make a Leaſe for years, with clauſe of Re-entry for not payment of the Rent, although the Rent be behinde, yet the King ſhall not re-enter before Office found; and there ought to be a Seiſure, for the Leaſe is not voyd by the non-payment of the Rent, but onely voydable: but if the Leaſe be voyd for not payment, as in our caſe it is, to what purpoſe ſhall an Office be? for by the meer contract the Leaſe ceaſeth, without re-entry, or without Office: But admit that the Leaſe ſhall not ceaſe without Office, and before Office the Queen grants the Reverſion over, yet an Office found after the Grant ſhall avoyd the Leaſe as well as if it had been found before the Grant. A Leaſe is made upon condition, that if the Leſſor build a Houſe upon the Land leaſed, and pay to the Leſſee 20 l. that then the Leaſe ſhall be voyd; the Leſſor builds the Houſe, and afterwards grants the Reverſion, the Grantee pays the 20 l. now the Leaſe is voyd, although the Condition be partly performed in the time of the Leſſor, and partly in the time of the Grantee. So here, although the Grant of the Queen be Mean between the non-payment of the Rent, and the Office; for the Queen is not entitled by the Office to the Land, but by the Condition broken, and the Office is onely to inform the Queen of her Title; and when the Office is once found, it ſhall relate unto the time of the Condition broken, and ſhall be of ſuch force as if then it had been found: and here in our caſe an Office was neceſſary for to entitle the Queen to the mean profits due betwixt the Rent arrear, and the Grant of the Queen, with which the Queen by her Grant hath not diſpenſed; and without Office ſhe could not have them; for the arrearages of the Rent do not paſs to the Patentee, no more then if the Queen be ſeiſed of an Advowſon, and the Church become voyd if the Queen grant the Advowſon unto another, the avoydance ſhall not paſs. The King ſeiſed of a Rent which is arrear, grants the ſaid Rent, the arrearages ſhall not paſs: So here of the mean profits, for they are flowers ſain from the ſtalk, &c.

Godfrey contrary; and he ſaid, That the Leaſe is in being not impeached by the Condition, or the Office: and ſaid, That notwithſtanding that the words of the Leaſe are, That the Leaſe ſhall be voyd, yet before that an Office be found, the Leaſe ſhall not be avoyded: In all caſes where the Queen is entituled to any thing, or to defeat the Eſtate of another, an Office is neceſſary; and that ground is taken in the caſe of the Lord Barkley, Plow. Com. 229. by Brown, therefore here, it ought to be found by Office: See alſo the Caſe of the Biſhop of Chicheſter, Fitz. N. B. Forfeiture 18. 46 E. 3. The Biſhop leaſed for life certain Lands given by the Progenitors of the King, as parcel of the Barony of the Biſhoprick, rendering 30 l. Rent; and afterwards, by aſſent of the Dean and Chapter, releaſed a great part of the ſaid Rent; the Leaſe and the Rent ought to be found by Office. So an Alienation in Mortmain ought to be found by Office, becauſe the intereſt of another is to be defeated: So where the Kings Tenant ceaſeth, &c. the Villein of the King purchaſeth Lands, or but a Leaſe for years: So where the King is but to have annum diem & vaſtum, Waſte committed by the Committee of the King: Leſſee of the King for years makes a Feoffment in Fee; in all theſe caſes the King, without Office, ſhall not be entituled. The ſame Law is in caſe of a Condition broken; which ſee 2 H. 7. 8. Plow. 213. Frowick in his Reading puts this caſe; A Subject leaſeth for years upon condition, which is afterwards broken, and afterwards the Leſſor becomes King, here needs no Office, for at the time of the breach of the Condition the Leſſor was not King. The Caſe betwixt Sir Martin Forbiſher and one Bunny was, That the Queen

Forbiſher and Bunnies Caſe.

Queen made a Leaſe of Dutchy Land upon Condition, which was broken: It was holden, that here there needs not any Office, for the Queen had thoſe Lands ſevered from the Crown by Parliament, and they paſs by the Dutchy Seal by Livery, and attornment of the Tenants: The Queen leaſeth for years, Proviſo, that the Leſſee ſhall not alien; ſuch alienation againſt ſuch a Condition ought to be found by Office: and therefore at this day, where a Forfeiture is given to the King, &c. by Statute, the words are, That the King ſhall be ſeiſed without Office: And as to the Relation of an Office, he ſaid, That an Office may have a Relation as to mean profits, but not as to veſt the intereſt from the time of the Title accrued. And although that in the Grant of the Queen to Sir Thomas Henage there be theſe words, Non obſtante, the not finding any Office, yet in this caſe an Office is neceſſary, for the Queen cannot diſpenſe with the Law, ſo to alter or change the Law, as to make Lands in Borough-Engliſh deſcendable at the common Law: So if the King make a Leaſe for years, with clauſe of re-entry, and afterwards grants the Reverſion over to a Subject; and further grants, that if the Rent be behinde, that the Leſſor may re-enter without demand; yet the Grantee ought to demand the Rent. And, as our caſe is here, there needs not any Office to entitle the Queen to the Mean profits; for although that the Rent was not payd at the day, yet it was payd after, and all Rent due afterwards, and Acquittances given for the ſame; which matter we have ſpecially pleaded to the intent aforeſaid, upon which the other ſide have demurred, and thereby have confeſſed it, &c. But this Office doth not give any intereſt to the Queen in the thing leaſed, for ſhe hath granted them over before, by which ſhe hath diſabled her ſelf to take advantage of the Condition aforeſaid, for ſhe hath forceaſed her time: 8 H. 5. Traverſe 47. Tenant for life forfeits his Eſtate, and before the King ſeiſeth, the Tenant for life dyeth, he in the Reverſion may enter, and the King ſhall not ſeiſe, for the King hath forceaſed his time. And if the Queen ſhould have advantage of this Condition, ſhe ſhould avoyd her own Grant, which ſhould be a great inconvenience: The Queen leaſeth for years, Proviſo, that the Leſſee ſhall not do Waſte; the Queen grants over the Reverſion after Waſte done, Office is found, the Queen gains nothing by it. It was agreed in the Caſe betwixt Knight and Beech, 28 Eliz. That the Grant of the Queen Mean between the award of the Commiſſion, and the Return of it was good; for the Title of the Queen appeareth of Record, although that the Commiſſion was not returned before the Grant made: And if an Office ſhould relate unto the time of the Condition broken, it ſhould be in vain to argue that point: for in the ſaid caſe it was holden a Record, when the Jurors had put their Seals to it, before that it be enrolled: The acceptance of the Rent, and the Acquittances thereof are pleaded, 1. To prove, that there is no cauſe to finde an Office in this caſe, for the Queen is anſwered the Mean profits: 2. To prove, that the Queen hath waved and refuſed to take the benefit of the Condition, but not to conclude the Queen, and then you cannot force her to take the benefit of the Condition: As the King, Lord, and Tenant, the Tenant dyeth, his Heir within age, the King accepteth of the Services of the Heir, and afterwards grants over the Seignory, after Office is found, the King ſhall not have the Wardſhip, &c.

At another day it was argued by Popham, Attorny General, for the Plaintiff; and he ſaid, That upon not payment of the Rent, the Leaſe is ipſo facto voyd, without any Office found thereof, and that by reaſon of theſe words, [ſhall be voyd;] for he ſaid, It is not a Condition, but rather a limitation: As if the King make a Leaſe to three for eighty years, ſi tam diu vixerint, one of them dyeth, the Leaſe is determined without Office:

Office: So a Leaſe made by the Queen for years, ſo long as the Leſſee ſhall pay the Rent reſerved, or ſo long as the Leſſee ſhall there inhabit: In theſe caſes, upon a Leaſe made by a common perſon, the Leſſor before Entry might grant over, and the Grantee ſhall have advantage of it, for it is a limitation, and by the limitation the Leaſe is determined before the Grant; contrary, if it had been by words of re-entry. A Leaſe for ſixty years, Proviſo, that if the Leſſee ſhall dye within the term, that the Leaſe ſhall ceaſe; the Leſſor grants the Reverſion over, the Grantee ſhall take advantage thereof by the common Law: See the Caſe 11 H. 7. 17. it is a limitation, and not a Condition. And he ſaid, in this caſe an Office is neceſſary, not to avoyd the Leaſe, for that was voyd before; nor to puniſh the Leſſee as a Treſpaſſor, or to fine him for the continuance of his wrongful poſſeſſion; but to make him reſponſable as an Accountant. In the Leaſe of a common perſon, where the clauſe is, That the Leaſe ſhall ceaſe; If after the Rent behinde, the Leſſee continueth his poſſeſſion, yet the Leſſor ſhall not puniſh the Leſſee as a Treſpaſſor before his Entry, for the Leſſee by his continuance is but Tenant at ſufferance, for his firſt Entry was lawful: And he agreed the Books, 14 H. 8. and 2 H. 7. That ſuch advantages that a common perſon cannot have without Entry, the Queen cannot have without Office: But a common perſon before Entry cannot puniſh another by way of Treſpaſs, therefore neither the Queen, without Office, ſhall puniſh one as an Intruder: And as to the Caſe, now late adjudged betwixt Knight and Beech, the ſame doth not extend to our Caſe; for there an Office was requiſite before the Grant of the Queen, becauſe the per-cloſe of the Condition was, That the Prior ſhould re-enter: and it is very clear, That Chattels veſt in the Queen without Office. And in this Caſe an Office is neceſſary for two purpoſes: 1. To make the Grant good: 2. To make the Occupier accountable for the Mean profits, and to give recompence, which the Queen is not enabled unto without Office. And here the Patentee ſhall have advantage of the ceſſer of this Leaſe: For, 1. He hath the Inheritance lawfully: and, 2. The Leaſe is determined. If there were no Non obſtante in the Letters Patents, the ſaid Leaſe ought to have been recited, if it had not been determined; and if it be determined (as this caſe is) it ought to be recited, if there were not a Non obſtante; for non conſtat to the Queen, if it be determined or not: And he ſaid, That Leaſes which are of Record, are to be recited in Patents of the King, but not thoſe which are not of Record, for Leaſes on Record may be eaſily found, but contrary of Leaſes in Fait: but in our caſe all is helped by the Non obſtante; for the words of the Letters Patents are, Non obſtante, That no Office be thereof found, miſrecital or non-recital of the former Leaſes, &c. It hath been objected, That becauſe that the Law of the Land is, That in Grants of the King, all former Eſtates ought to be recited, the Non obſtante of the Queen ſhall not help it: To that he ſaid, That where the Law makes for the Queen, there the Queen for a particular reſpect may diſpenſe with the Law. If the Queen be deceived by the not recital, that makes the Letters Patents naught; but if the Queen be not deceived by the non-recital, the ſame ſhall not hurt. And it is clear, That the Queen may diſpenſe with a Statute Law, although perhaps not with the common Law: The Queen grants upon ſuggeſtion, if the ſuggeſtion be falſe, the Patent is voyd, becauſe the Queen is deceived in her Grant: and if the ſuggeſtion reſt in Articles, and ſome of the Articles be falſe, the Patent for that is voyd: but if in the Patent ſuch clauſe be, That be the ſuggeſtion true or falſe, the Patent ſhall be good: If the King ſeiſed of a Manor, to which an Advowſon is appendant, grant the Manor, cum pertinentiis, the Advowſon ſhall not paſs: But if the Grant be in tam amplis modo & forma, &c. prout ipſe Rex tenuit, the Advowſon

Knight and Beeches Caſe.

ſhall paſs. And he ſaid, That the Office here is not neceſſary to determine the Leaſe, but to enable the Queen to puniſh the Leſſee for the continuance of his poſſeſſion: And if the concluſion of the Condition had been by way of re-entry for non-payment of the Rent, and after the Rent is behinde, and afterwards the Queen accepts the Rent due after, the Queen is not bounden by that, but upon an Office found ſhe ſhall avoyd the Leaſe.

Drew, Serjeant, contrary; and he ſaid, That here is a condition, but not a limitation; for here is the natural word of a Condition, (ſcil.) Proviſo. Some Caſes put by Popham are Conditions, and not limitations: As a Leaſe for years, Proviſo, that if the Leſſee dye within the term, that then the Leaſe ſhall be voyd, the ſame is a Condition: And in many Caſes many words (leſs apt then theſe in our Caſe) ſhall make a Condition: As a Feoffment, dummodo ſolvat, &c. And he ſaid, That without an Office the Leaſe is not voyd: See 35 H. 6. 57. The King giveth to Religious uſe certain Lands, ad effectum, to finde a certain number of Monks, to hold in Frankalmoign: the King in that caſe cannot have Ceſſavit, for the Services are not certain; but if it be found by Office, that they have not their number, or do not make their Prayers, the King ſhall ceaſe; by Br. t. Office 4. And he ſaid, that this was often done in the time of King Henry the eighth; Lands given, Habend. pro erectione Collegii Cardinalis Eborum, &c. Where the King is to have Lands but as a pledg, as for an Alienation without licenſe, Office ought to be found of ſuch Alienation: So of a Feoffment made to an Alien; otherwiſe it is in caſe of neceſſity, becauſe the Freehold cannot be in abeyance: Tenant of the King is attainted of Treaſon before 33 H. 8. the King ſhall have the Land in point of common Eſcheat until Office be found, and afterwards by force of the Attainder. So if the Tenant of a Subject be attainted of Treaſon before Office found, the Land ſhall be in the Lord, but after Office it ſhall be in the King: 7 H. 4. If the Kings Tenant dyeth, his Heir within age, the King may ſeiſe the Body, and grant it over without Office, but not the Lands: See for the ſame 5 E. 6. Br. Office 55. in the Caſe of Charls Brandon. 35 E. 3. Villinage 22. The Villein of the King purchaſeth Goods and Chattels, the property of them is in the King before Office or ſeiſure, but in the caſe of Lands he ought to ſeiſe: If this had been the caſe of a common perſon, the Leaſe ſhould not be avoyded without demand, therefore neither in the Caſe of the King without Office: For as the Leaſe it ſelf was made by matter of Record, ſo it ought to be avoyded by matter of Record, otherwiſe it ſhall not be taken voyd in Law, notwithſtanding that the words are, That the Leaſe ſhall be voyd. By the Statute of 11 H. 7. Alienations and Diſcontinuances by Women are made voyd, the ſame ought not to be holden altogether voyd as betwixt ſuch Woman and the Alienee, but onely betwixt the Woman and the Heir. The Statute of 1 Eliz. enacts, That all Leaſes made by a Biſhop above the term of twenty one years, ſhall be voyd; the ſame ſhall not be conſtrued to be voyd, but onely as to the Succeſſor, for it ſhall binde the Leſſor himſelf, as it was adjudged 5 Eliz. in the Caſe of the Biſhop of Bathe. As unto the Office here in our caſe, the ſame ſhall not enure to avoyd the Leaſe, but onely to enable the Queen to puniſh the party for the Mean profits after the breaking of the Condition: But in our caſe, nothing is due to the Queen for the Mean profits, for we have ſhewed the payment of all the Rents, and the Arrearages thereof, after the breach of the Condition, and before the Grant of the King; and therefore this Office, being for no uſe, ſhall be voyd, unleſs it had been found, that the Land was of more yearly value then the Rent, &c. As in the caſe of common experience of Chantries, the Lands ſhall not be intended to be of greater value then the Rent to be

payd

payd out of it, if not that it be found by Office: When the Queen hath after received the Rent, and granted over the Reversion, now the Forfeiture is purged, not by way of conclusion, but it amounts to as much as if the Queen had said, That she would not take benefit of it: 4 H. 6. Champernouns Case: The King, by taking in Ward of the Heir of the Donee, hath waved the Heir of the Donor: See Plow. in the Lord Barkleys Case, 3 Eliz. 237. and F. N. B. 143. And here in our case, when the Queen grants over the Reversion, here the whole use of an Office is gone; for no Office shall be found for the benefit of a Subject: and as to the Queen, no benefit shall accrue unto her by such Office, for if she by such Office shall be entituled to the possession, she should avoyd her own Grant of the Reversion; for she ought to have as great an Estate by the breach of Condition, as she had at the time of the Condition: And in this case the Office comes too late for the Queen, &c. as in the Lord Lovels Case, Plow. 18 Eliz. 482. A Lease for years is made unto an Alien, upon condition, that if the Alien pay such a sum of Mony to the Lessor at any time during the Lease, that he shall have Fee; the Alien is made a Denizen, the Mony is payd, and all that is found by Office: The Queen shall not have the Fee, for at the time of the vesting of the Fee the Lessee was Denizen; and the Office shall not relate to the time when the Fee vests, and no further, but to avoyd incumbrances: and so in such case the Office comes too late. And if the Kings Villein purchaseth Lands, and the King make him free, and afterwards Office is found, the same shall not entitle the King, but the Villein manumitted shall hold the Land: So in our case, the Queen after this Grant shall not take the benefit of this Office, or breach of the Condition found by it.

And afterwards, Manwood, chief Baron, gave order, That those who do argue after, shall speak but to two points:

1. Where the Queen Leases for years, rendring rent payable at the Receipt at West. in which Lease there is a Proviso, That if the Rent be behind, the Lease shall be void; If now the Rent not being payed, the Lease shall be void without any Office?

2. To what effect an Office now shall be, being found after the Queen hath granted the Inheritance over.

At another day, Owen, Serjeant, argued to the contrary; and he said, the Lease is void without any Office: for as a Lease for years may be made by contract, so it may be avoided by words of contract, otherwise it is of Freehold; So that a Lease shall be avoided without entry, 6 E. 6. 137, 138. Plow. Brownings and Bestons Case; Offices are of two sorts: First, entituling the Queen, as purchase of an Alien, purchase of Villein, alienation in Mortmain; and offices informing the Queen, where she hath interest in the land before, as in our Case here: Admit that the Office was necessary to finde the breach of the Condition; the Patentee shall take the benefit of it: for being found by Office, that the Queen hath made such a Lease with condition to be void for non-payment of Rent, and that at such a day the Rent was behinde, now, being of Record, every subject shall take advantage of it: As where the husband makes a Feofment in Fee upon condition, of the land of his wife, and dieth; If the heir enter for the condition broken, now may the wife enter upon him; for now the discontinuance is avoided: See 11 H. 7. 17. Where the Grantee of the Reversion shall take advantage of a condition, ut supra, concluding, that the Lease shall be void: And see 136. Plowd. Bestons Case. And although after the default of payment, the Rent due afterwards was accepted, yet that shall not conclude the Queen; for this acceptance is not under the great Seal, but only done by the Office: Also the Lease being void, for the non-payment, cannot be made good by acceptance afterwards.

Atkinſon, contrary, Although, that the Leaſe be void, de facto, yet untill it appeareth to the Court, the Court cannot ſay it is void, or not void: therefore Office is neceſſary to aſcertain the Court: The Queen is a body Politique, and the chief body Politique above others, becauſe ſhe is the Maker, Author, and Creator of all other Corporations; and that is the reaſon, that the King cannot ſpeak without writing; and this is the moſt ſolemn writing: i. Writing of Record; So ſhe cannot take but by Record: And in our Caſe, It doth not appear by any writing of Record, the Rent was behinde; and it is agreeable to the Majeſty of the King to do nothing without matter of Record; which ſee 4 Eliz. in the caſe of the Dutchie: And he ſaid, there is no difference betwixt the Caſe in 2 H. 7. and our Caſe: In each Caſe it is a Leaſe for years, Rent reſerved, in this only differing; that there is a clauſe of re-entry; and here the concluſion of the Condition, is that that the Leaſe ſhall be void; but in both caſes, none can ſay that the Rent is behinde, untill it be found by Office, therefore none can ſay, that the Leaſe is void, untill Office found: See by Thorp, 35 E. 3. Chattels perſonals of the Kings Villeins, are in the King without Office, for ſuch things may be loſt or worn, contrary of Chattels Reals; as a Leaſe for years; for land cannot but continue: and ſuch things which may be in the King without writing, he may grant without writing, as a chain, of Gold, or a Horſe, Weodands, Felons goods, Wreck, &c. veſt without Office, becauſe Chattels perſonals: See 20 E. 4. 11. contrary, when they are Chattels Reals, and permanent; for there an Office is neceſſary: In the Caſe of year, day, and waſte, an Office ought to be found, Ergo, a multo fortiori, in caſe of a Leaſe for years, which is a greater intereſt, &c. 49 E. 3. 11. There is a generall Rule, Quo modo quodque ligatur, eo modo diſſolvitur: That which paſſeth by Livery ought to be reduced by re-entry, that which begins by Record, ought to be determined by Record; and here in our Caſe, the land cannot depart from the King without Record, therefore it ſhall not revert without Record; although that the breach of the condition be but matter of fact, yet the proof of that ought to be of Record: And here in our Caſe, is a condition, and not a limitation. And he ſaid, that in the Caſe often cited before of 11 H. 7. 17. it is a limitation, and not a condition; For if it were a condition, the Grantee by the Law could not take advantage of it, becauſe not privie: and he was cleer of opinion, that where the words are, That the Leaſe ſhall ceaſe, or ſhall be void; yet in ſuch caſes there ought to be an Office, for in Leaſes of the King there needs no re-entry, becauſe the King (to ſpeak properly) cannot re-enter. And the words, [That the Leaſe ſhall be void] do amount to words of re-entry, and he ſaid, That in the caſe of a common perſon, upon ſuch a condition broken, the land ſhall not be in the Leſſor, without re-entry, no more ſhall they be here in the caſe of the Queen without an Office: Alſo the Rent reſerved upon this Leaſe was behinde, and the Leſſee continuing the poſſeſſion, the Queen by acceptance of the Rent, hath affirmed the party Tenant, and afterwards granted the Reverſion over before any Office found of that matter; Now the Leſſee is diſcharged, and ſhall never be impeached for the ſaid Rent behinde; and the Grant, Ex certa ſcientia, &c. after found, ſhall not defeat this Grant by any relation. And the Queen by her Grant hath given included, all the advantage which accrued unto her by the breach of the Condition: And as to that which hath been objected, That in the Letters Patents there are theſe words, Notwithſtanding the not finding of any Office, &c. truly, the ſame makes the matter more cleer for us; for by theſe words, it is apparent, that the Queen would not have an Office found; and if ſo, then the land paſſeth as in Reverſion, and the Queen may diſpenſe with a thing concerning her ſelf: as of late it was adjudged in the Caſe of one Michel. The Queen makes a Leaſe for years, rendring Rent, Si petatur, It was holden in ſuch caſe, that the

Rent

Rent in such case, ought to be demanded by the Queens officer; and in such case the Queen may well enough dispense with her Prerogative; and here the Queen conceived, that she should not have an Office, nor have her Title found by it: Manwood, chief Baron, The Queen Leaseth for years upon condition, That if the Lessee doth not marry within two years, that the Lease shall be void, whether here there ought to be an Office or not. Atkinson said, That here ought to be an Office.

At another day, It was argued again by Godfrey, This Lease is not void, Ipso facto, for the not payment of the Rent, which is but matter in fact: and as this Lease hath his beginning by matter of Record, so also his end shall be by matter of Record: In cases of a common person, there ought to be a demand, therefore in case of the King, an Office, as in the case of a common person demand ought to be as well where the Condition is by way of re-entry, as that the Lease shall be void; therefore in both cases, in the case of the King there shall be an Office: and he said, That if the Lease and the Condition be in the case of a common person, that the Lease shall be void, without any demand of that Rent, then there needs no demand; for demand is a part of Contract: and here, before Office found, the Lease is not merely void, for a Release unto the Lessee before Office, is good; and the Queen is not entituled to the profits before Office found: It was argued by Coke to the contrary, The Lease is void without any demand, without any Office, for it is parcell of the Contract to be so void, and he said, That this Lease before Office is void in interest and property, but not in possession: Where a common person shall not have the land without action, the King shall not have it without Office, and Scire facias; as Cessavit, Waft. contra formam donationis, &c. and where a common person shall not have before entry, the King shall not have before Office, for Office is in the place of Entry, Wardship, Portmain. It is cleer, in the case of a common person, That if the Condition be, that the Lease shall be void without any demand, that there demand is not requisite, therefore nor in the case of the King: See Browning and Beskons case, That such a Lease with such a Condition, after the Rent behinde, cannot be made good: And it is a generall rule, That where the certainty of the term appears by Record, and the King is to have but a Chattell in it, there the King upon matter in fait shall have it without Office; as the Temporalties of the Bishop upon his death, which is matter in fait: See F. N. B. 174. The widow of the King marries her self without license of the King, the King shall seize the lands, and that without Office, and there the marriage is matter in fait: The King Leaseth for years upon condition, that if the Lessee marry, that then the Lease shall be void, If the Lessee marry her self, the Lease is void without any Office; and if so, then every stranger in the world shall have advantage of it, as the case is, 11 H. 7. as was the case of Ralph Thomas; The husband seised of land in the right of his wife, leaseth for years, and afterwards he and his wife levied a Fine to a stranger, the husband dieth, the Conusee shall avoid the Leas, because it was meerly void by the death of the husband: So of a Rent charge granted by the husband, &c. But although this Lease be meerly void, yet a Bill of Intrusion doth not lie against the Lessee before Office, for in such case, a common person shall not have Trespasse before entry; but yet, if the Lessee dieth after the Rent behinde, ut supra, the Lease shall not be said Assets to the Executors, for the not payment of the Rent is a nullity of the Lease by the intent of the Originall Contract: And also the Lessee is not become Tenant at sufferance after the Condition broken, for Tenant at sufferance takes the profits to his own use; also none can be Tenant at sufferance to the Queen, for then he should have the profits of the Lands by Laches, which shall never be imputed to the Queen: Now it is to see, To what purpose this Office is? A common person makes a

Ralph Thomas Case.

Lease

Leaſe upon condition, that if the Leſſee alien part, and that be found by Verdict, that the Leaſe ſhall be void, the Leſſee alieneth part, the Leſſor grants the reverſion over; after the alienation is found by Verdict, the Grantee ſhall have advantage of it; if the caſe had been, That if the rent be behinde, and Office of it, that the Leaſe ſhould be void, the rent is arrere, and the King grants the reverſion, and afterwards Office is found, now the Leaſe ſhall be void againſt the Grantee: Alſo this Office ſhall have relation, and comes in as good time, as if it were found before the Grant; Tenant of the King alieneth in Mortmain, the King grants over the Seignory, Office is found; now by this Office, the King is entituled, not unto the land, but unto the profits before the Office: And although the Queen hath granted the reverſion over, yet ſhe hath not granted inclusive the mean profits: A common perſon hath a rent which is arrere, he grants the rent, the arrerages do not paſſe: As where the King is ſeiſed of an advowſon which becomes void, and afterwards grants the advowſon to another, the avoidance ſhall not paſſe thereby; and that was Giles Caſe: See 16 H. 7. 7, 8. And in our caſe, This Office doth not entitle the Grantee; for how can an Office entitle a common perſon? If the Leaſe were but voidable, perhaps, ſo long as the Leaſe ſhould continue unavoided, the Queen ſhould not be anſwered the profits, contrary, where it is void. And a common perſon ſhall have advantage of it.

Giles Caſe.

Egerton, Sollicitor Generall, to the ſame intent; And he ſaid, that this Leaſe is altogether void, in privity, property, right, and term: In the caſe of a common perſon, after the rent behinde, in ſuch caſe the Leſſee ſhould be Tenant at ſufferance, which cannot be in the Kings caſe; and if Tenant at ſufferance, then no privity; for a Releaſe by the Leſſor to the Leſſe cannot enure, and that for want of privity, Litt. 109. And ſuch Leſſee cannot attorn, and if the Leſſor after that accepts of the rent, the ſame doth not make the Leaſe good, and all for want of privity; therefore here is no privity: As to property, ſuch a Leaſe ſhall not be ſaid Aſſets in the hands of an Executor, nor ſhall be ſold upon an Extent, nor forfeited by outlawrie; And here in this caſe, the Queen cannot be ſaid to take any thing by the breach of the Condition, but hath her reverſion diſcharged of the Leaſe; and he ſaid, That the Office is found well enough for time, and it ſhall relate to the time when the title accrued, that is, when the rent was behinde, and the arrerages of the rent do not paſſe by the grant of the land, or the reverſion: The Queen hath a rent-charge out of lands which is behinde, the lands come to the Queen, and ſhe grants the ſame over, yet ſhe ſhall charge the lands with the ſaid arrerages; but contrary, in caſe of an injury done upon the land of the Queen: As the Tenant of the King alliens without license, and afterwards the lands ſo alienes came to the Kings hands who grants them over; the Grantee, nor the land ſhall be charged, but only he who was party to the alienation, his lands, and his Executors; So of an Intruſion: Tenant for life of the King makes a Feoffment in Fee, the King grants over the reverſion, and afterwards the tortious Feoffment is found by Office; this Office is ſoon enough for time and the Grantee of the reverſion ſhall have advantage of it, and the King the mean profits from the time of the alienation: and afterwards in Mich. Term, 33 Eliz. the caſe was argued by the Barons.

Clark, Puiſne Baron, The Leaſe is conditionall, and with a limitation alſo; ſo conditionall and limitations mixt together, 3 Aſſ. 10. Land given to one untill he come from forreign parts; lands given to one ſo long as he ſhall continue ſole, is an Eſtate for life with limitation upon her marriage; ſo during the coverture, &c. and theſe limitations are not collaterall, but begin with the Eſtates, when the Eſtates are limited; but conditions always come when the Eſtate is ſetled, as it is in our Caſe; yet if the intent

tent and ſubſtance of the Contract betwixt the King and the Subject be well conſidered, there ſhall not be any difference, &c. Lands deviſed to one, Proviſo, That if the Deviſee ſhall diſturb the Executors of the Deviſor, his Eſtate ſhall be void, and the land remain over, &c. the ſame is a good remainder, for it is a limitation conditionall: See Scholaſtica's Caſe, Plowd. Com. 14 Eliz. 413. concerning an Eſtate tail with a limitation: And Fitz James Caſe there put by Dyer: See Browning and Beſtons Caſe before cited, and Martin Dockrags Caſe, where a condition is conceived in words of Covenant, &c. Gent, Baron, argued to the ſame intent: Manwood, chief Baron, to the ſame intent. The Rents reſerved upon the Leaſes of the Queen, are to be paid to Receivors, Baileys, or at the Receit of the Exchequer: The Queen ſhall not make any demand of her rent, for ſhe hath an infinite number of Farmors, and if demand be neceſſary, ſhe were to ſend an Army of Receivors, or Baileys to receive and demand her rents. If the rent of the King be to be paid at the Exchequer, if the Kings Farmor be there, and tender the rent at due time, and none be there to receive it, he hath ſaved his Leaſe, for he hath done his poſſible endeavor, although the words of the condition in the Leaſe be behinde and unpaid, yet not tendred, ſhall be underſtood: as in the comon caſe of Mortgages and Obligations. But in all the Record before us, there is no words of any tender, therefore, according to the words of the condition, the Leaſe is meerly void, and determined in right, in privity, and in tenure; for ſo is the pleaſure of the Prince expreſſed in her Letters Patents under the great Seal of England, That it ſhall be then void, and of no effect: Then, if whenſoever the Rent ſhall happen to be behinde, and therefore as ſoon as the Rent was behinde the Leaſe was determined: ſo that if after the non-payment a ſtranger had entered upon him, (ſcil.) the Leſſee, upon which he brings Ejectione Firmæ, the Defendant might have pleaded the ſpecial matter againſt him, Judgment if Action: ſo, as the Leaſe is voyd in Right: It is alſo voyd in Privity and Tenure; for a Releaſe to ſuch Leſſee, after the Rent is behinde, is altogether voyd, for he was not then Leſſee, and ſo the privity is gone, and no acceptance can make ſuch Leaſe good. And if ſuch a Leſſee after his Rent would ſurrender, and in conſideration of ſuch Surrender obtain a new Leaſe from the Queen, this new Leaſe is alſo voyd, for hereupon the matter is no ſurrender: Alſo ſuch a Leaſe is voyd in property, for if the Leſſee in ſuch caſe dyeth, his intereſt, ſuch as it is, ſhall not be accounted Aſſets in the hands of his Executor: upon the breach of this Condition for the Rent, although that the Leaſe be become voyd, yet the poſſeſſion of the Land is not veſted in the Queen without Office: and although the Office doth not make the Leaſe voyd, which was voyd before for non-payment of the Rent, yet before Office found the poſſeſſion is not veſted in the Queen; for before Office found we cannot award Proces againſt ſuch a Leſſee for his continuing the poſſeſſion after the Rent behinde, and until Office found the Leſſee cannot be found an Intruder; and Tenant at Will he cannot be, for no other Will appears of the Queen, but that in the Letters Patents, and that is to have the Leaſe voyd, whenſoever the Rent ſhall be behinde, and that Eſtate is gone becauſe the Rent is behinde; Tenant at ſufferance he cannot be in this caſe. In caſe of a common perſon, when Leſſee for years holds over his term, he is become Tenant at ſufferance, and ſuch a Tenant ſhall not pay Rent, for it is the folly of his Leſſor to ſuffer his Leſſee at ſufferance to continue poſſeſſion of the Land after his term, ſo as every Tenancy at ſufferance is made by the Laches of the Leſſor, which Laches cannot be imputed to the Queen: therefore here, this Leſſee, when the Condition is broken, is not a Tenant at ſufferance, nor ſhall have the profits of the Lands to his own uſe, but the Law ſhall account him to be a Bayliff of his own wrong, and ſo be accountable

countable to the Queen, but no Intruder till Office be found: and that appears in our Books, 1 H. 7. 17. The Kings Tenant dyeth, his Heir within age, if any entereth into the Land of the Heir, he shall not be an Intruder until Office found, but the Heir or a Stranger who entereth before Office, and takes the profits, shall be brought by Proces into the Exchequer to make their Accounts, and to answer the issues and profits; but if he intermedle after Office, he shall be an Intruder. Tenant of the King alieneth without license, by that the King is to have the profits, until he compound with the King, and purchaseth his pardon, and if the Feoffee taketh the profits after the Alienation, he is a Perner of the profits, and shall answer for them; but he is not an Intruder until Office found. Tenant of the King is attainted of Felony, the King is entitled to the Land from the time of the Felony committed, yet if he take the profits until Attainder, he is not an Intruder, but he taketh the profits without Title, therefore he is Bayliff of his own wrong, and so accountable to the King. And it is not a new thing, that a Conveyance or an Estate shall be void as to the Right onely, and not as unto the Possession. The Statute of Domf. West. 2. finis ipso jure sit nullus: i. as to the right of the Entail; yet, as unto the possession, the issue in tayl is bound until he hath recovered it by a Formedon: Upon the Statute of 21 H. 8. cap. 13. by acceptance of another Benefice against the said Statute, the first Benefice shall be void, &c. yet the same shall not be construed so as to possession, but that the same shall remain with him until it be taken away from him: The Queen leaseth for years, Proviso, that if the Lessee commit Waste, the Lease shall be void; when first Waste is done the Lease is determined in Right, but not as to the possession before Office finding the Waste: So if the Condition be for the building of a House, for by the breach of the Condition, the Lease, as unto the right and interest, is determined, and after Office found it shall revest the possession also: And if a Lease of the King expire by effluxion of time, and such effluxion appeareth here of Record, if the Lessee in such case continueth his possession, he shall be an Intruder. Sir Robert Chesters Case, Dyer 4 Eliz. 211. Sir Robert Chester was Receivor of the King by Patent, upon condition to render Account yearly at such a day, and before such a day to pay the arrearages; the condition is broken, the Patent was void without Office thereof found, but yet it is not altogether void, for a Scire facias shall be brought against the Patentee. The King leaseth unto A. his Manor of D. and after he leaseth also to the said A. his Manor of S. Proviso, that if the Lessee doth not surrender his first Lease of the Manor of D. at such a day, that then the latter Lease of the Manor of S. shall be void: The Surrender is not made, now the Lessee, if he continue his possession in the Manor of S after, he is an Intruder. Now is to see of what effect the Office is, not to make the Lease void, but to vest the possession in the King again: It hath been objected, That, as the case is, the Office is not to any purpose, for the Queen hath granted the inheritance over, so as the possession cannot be revested in the Queen by that Office against her own Grant, nor can the Queen punish the Lessee as an Intruder for his continuance of the possession after the Office, nor can seise the Land by such Office, and there is not any such Office for the benefit of a Subject, therefore the Office is meerly void. Let us compare our Case unto the Case of Cessavit; The Tenant of the King leaseth for two years, the King grants the Seignory over in fee, the Cesser is found by Office, the Grantee of the Seignory gains nothing by it; but that is not like unto the Case in question, for there when the Office is found, the Tenant may tender the arrearages, for the King is not absolutely entitled by the Cesser, because by tender of the arrearages the Tenant may save his Tenancy: But in this case, after the Condition is once broken,

there

there is not any means for the Tenant to ſave the Forfeiture: alſo the King by his Grant, after the Ceſſer, hath not granted the thing which accrued unto him by the Ceſſer, (ſcil.) the Tenancy, but onely the Seignory: but in our caſe the King hath granted the thing forfeited, i. the Land demiſed: and here is a full forfeiture, contrary in the caſe of Ceſſer: And in our Caſe the King hath granted onely the Land demiſed, and not the profits encurred mean between the breach of the Condition, and the Grant of the King, but theſe remain to the Queen, and to that purpoſe the Office is good, (ſcil.) to entitle the Queen to theſe profits. And as to that which hath been objected, That the Leſſee hath always payd the Rent unto the Queen after the Condition broken, and hath an Acquittance of the Receit of it, therefore no profits due to the Queen, for ſhe hath the Rent in lieu of the profits; and it is not reaſon, that the Leſſee ſhall pay an annual Rent, and alſo ſhall be accountable for the mean profits, and ſo the Office, as unto the mean profits (which in truth upon the matter aforeſaid are not due unto the Queen) is void, and then altogether void, quia nihil operatur. To that he anſwered, That the King ſhall not be bound off the mean profits in that caſe by the payment of the ſaid Rent, for by intendment the true annual value of the Land is more then the Rent reſerved; and it is not reaſon but that the Queen ſhall be anſwered of the ſurpluſage or overplus above the Rent, and therefore the Office entituling the Queen to part of the profits is good enough: Tenant of the King for life, or for years, makes a Feoffment in Fee, although that by this Act he cannot pluck any thing out of the King, yet becauſe he hath attempted to do ſuch a wrong, it is a forfeiture, and the Leaſe for years utterly extinct by it; for it cannot be in the Feoffor againſt his own act, by which he hath departed with all his Intereſt, &c. And the Feoffee cannot have it, for if he hath any thing, it ought to be a Fee-ſimple, or nothing at all; and a Fee-ſimple he cannot have, for that remains in the King, and ſo neither have Eſtate, then is all in the King, and the King hath Title to have the profits, &c. But put caſe, that after the Feoffment the King grant over the Land in Fee, and after that tortious Feoffment is found by Office, he who occupieth the Land after the forfeiture, until Office be found, ſhall be accountable to the King for the iſſues and profits, &c. as Pernor of the profits, or Bayly of his own wrong, and he who occupieth the Land after the Office ſhall be puniſhed as an Intruder. There was a Caſe very late in this Court betwixt Sir Tho. Henage and one Hungate, which was thus; The Queen leaſed for years unto Hungate, provided that he ſhould not do Waſte; Waſte is done, the Queen granted the Reverſion to Sir Tho. Henage, Office is found, the Grantee entered, and his Entry was adjudged lawful, and that the Queen ſhould have the mean profits from the time of the Waſte done until the time of the Grant. Some ſay, that that caſe was not adjudged, but compounded: And he vouched Sir Walter Mildmays Caſe: The Lord Sturton held Lands of the Queen in Knights-ſervice, and was attainted of Felony, by which the Lands eſcheated to the Queen, who granted thoſe Lands; and it was holden, that the Queen ſhould have the mean profits betwixt the time of the Felony committed, and the Grant. And after in the principal Caſe Judgment was given for the Plaintiff, (ſcil.) the Patentee of the Queen againſt the Leſſee; who caſt in a Writ of Error, and by his Counſel prayed, That the Writ of Error be not broken open until the Judgment be entered. Manwood, The Judgment hath reference and relation unto the firſt day of this Term, and therefore do not doubt of that.

Sir Tho. Henage & Hungates Caſe.

Sir Walter Mildmays Caſe.

Mic. 32 *Eliz.* In the Exchequer.

CLXXIX. Steds *Case.*

STed, of Great Melton in the County of Oxford, was assessed to 7 s. for Fifteens, and upon refusal to pay it, the Collector distrained the Beasts of Sted, and sold them: Sted brought Trespass thereupon in the Kings Bench; and the Collector exhibited his Bill into this Court against Sted, who shewed by his Councel, That the Statute of 29 Eliz. which enacted this Fifteen, provideth, That the said Fifteen shall be levyed of the movable Goods and Chattels, and other things usual to such Fifteens and Tenths, to be contributary and chargeable; and shewed further, that the Cattel distrained were tempore districtionis upon the Gleab Land of a Parsonage presentative, which he had in Lease, which Gleab Land is not chargeable usually to Fifteens granted by the Temporalty, nor the Chattels upon it. But it was the Opinion of the whole Court, Although that the Parson himself payeth Tenths to the King, yet the Lay-Farmor shall pay Fifteens, and his Cattel are distrainable for it, even upon the Gleab Land of the Parsonage; and therefore it was adjudged, that in the principal Case the Distress and Sale were good and lawful.

Mic. 32 *Eliz.* In the Exchequer.

CLXXX. *The* Dean *and* Chapter *of* Winsors *Case.*

IN this Case it was moved, If one hath a Rectory impropriate, and by the Statute of 26 H. 8. cap. 3. is to pay an annual Rent for the same in the name of a Tenth, and by that is discharged of Tenths and first fruits; If he shall have the Priviledg of the Exchequer? for he is to pay the same sum yearly: And the Barons were of Opinion, that he should not; for so every one, who is to pay any Tenths or first fruits, should draw another who sueth him into the Exchequer, and so all Controversies concerning Tythes and Parsonages should be drawn hither, which should be a great prejudice to the Spiritual Courts. But Egerton, Sollicitor, vouched a Case, (scil.) Coniers Case, where the King gave a Parsonage to a Prior in Frankalmoign, and the Tythes thereof being withdrawn, the Prior impleaded him who withdrew his Tythes in the Exchequer; and in that Case it was holden, that the Prior should have the Priviledg, for the King is in danger to lose his Patronage, or rather his Founderchip, if the Rectory be evicted. Gent, Baron, The Tenant of the King in chief, or he who pays first fruits, or he who holds of the Queen in Fee-Farm, shall not have in such respect the Priviledg here. Quære.

Coniers Case.

Mic. 30 *Eliz.* In the Common Pleas.

CLXXXI. Cony *and* Beveridges *Case.*

IN Debt upon a Bond, the Case was, That the Plaintiff leased unto the Defendant certain Lands lying in the County of Cambridg, rendering Rent; and afterwards the Defendant became bounden to the Plaintiff in a Bond for payment of the said Rent: upon which Bond the Plaintiff brought

brought an Action of Debt in the County of Northampton, to which the Defendant pleaded payment of the Rent, without shewing the place of payment: and upon payment they were at issue, and found for the Plaintiff by Nisi prius in the County of Northampton: In Arrest of Judgment it was moved, that the issue was mis-tryed; for here the payment of the Rent being pleaded, without shewing the place of payment, it shall be intended that the Rent was payd upon the Land, which is in the County of Cambridg: See 44 E. 3. 42. Anderson was of Opinion, that no Judgment should be given for the cause aforesaid: Rhodes and Windham contrary; for it doth not appear that the issue is mis-tryed, because that no place of payment is pleaded; and it might be, for any thing is shewed, that the Rent was payd in the County of Northampton.

Trin. 30 *Eliz.* In the Kings Bench.

CLXXXII. Berry *and* Goodmans *Case.*

IN an Ejectione Firmæ, upon a special Verdict, the point was, One intruded upon the possession of the Queen into Lands in Kisgrave in Suffolk; and during this Intrusion, the Queen granted these Lands to A. B. by her Letters Patents; and the Patentee, before any Entry made in the said Land, granted the same over. Some held, that the Grant was good, for the Intruder had gained nothing against the Queen, and by the Grant of the Queen, and the assignment over, nothing accrued to him: and where a man hath possession of Lands, his continuance therein cannot gain to him any interest, or encrease his Estate, without some other act done of later time. If the Gardian do continue in possession after the full age of the Heir, he is not a Disseisor, nor hath any greater Estate in the Lands: and upon the Book of 21 E. 3. 2. this case was collected; The Tenant of the King dyeth, his Heir within age, a stranger intrudes, the Heir at full age sueth his Livery out of the Kings hands, the Intruder dyeth in possession; the same descent shall not take away Entry.

Coke contrary; The Intruder cannot be Tenant at sufferance, for at first he enters by wrong, and none can be Tenant at sufferance but he who comes in by Title: And it is clear, That the Intruder by his first Entry doth not gain any Estate in possession, upon which he can have an Action of Trespass, but after the Grant of the Queen he hath presently Fee by wrong: 8 H 4. 129. A stranger enters upon the King to which he hath right in the right of the Ward, yet the Freehold doth remain in the Heir. And he said, That if A. levyeth a Fine to B. sur Conusans de droit, &c. now the Conusee hath possession in Law, but not in fact; and if before the Entry of the Conusee W. entereth, and dyeth seised, he hath no remedy, for he had not possession in fact, so as he might have an Assise, or an Action of Trespass: So the Law is now taken; A. deviseth his Lands to B. and dyeth, and a stranger entereth, and dyeth seised before any Entry by the Devisee, now is the Devisee without remedy: And here in our case, the Intruder hath not gained any possession in the Lands by his Intrusion, no more then if the King gives Lands to one in Fee, and before the Patentee enters, a stranger enters, now cannot the Patentee grant it over, if he doth not reduce the Estate by Entry: See Dyer 9 and 10 Eliz. 266. The Queen seised of the Mannor of Beverley, a stranger erected a Shop in a vacant plat of the Mannor, and afterwards took the profits of it, without paying any Rent for the same to the Queen, and afterwards the Queen granted the Mannor to the Earl of Leicester, and he never entered into the said Shop, nor took any Rent for the same, and afterwards the Occupier

P. 20 Eliz. in Curia Ward. Garbeffes Case. acc.

cupier of the Shop, died in poſſeſſion, and his ſon and heir entred; and the better opinion was, that the ſame was not a deſcent againſt the Patentee, becauſe at the firſt it was not a diſſeiſin againſt the Queen: Another Queſtion was moved, as to a path-way then in queſtion: And the Jury found that one ſide of the path-way was the land of the Parſon of the Church, and the other ſide the Church-yard, and prayed the opinion of the Court therein, to whom the intereſt of the path-way did belong; to which it was ſaid by the Court, That that ought to be found by the Verdict; For although that both be the Freehold of the Parſon, yet the ſoil of the path-way might be conveyed by an expreſſe Grant unto another; But the Court ſeemed to incline, that the ſoil of the path-way did belong to him who had the lands on both ſides, and that is the Caſe, as well of a High-way, as of a Path-way; And it is alſo good Evidence to prove ſuch matter, Who hath uſed to cut down the trees, or to cleanſe the way.

24 *Eliz.* In the Court of Wards.

CLXXXIII. Wiſemans *Caſe.*

IN the Court of Wards, before the Lord Treaſurer, Maſter of the Wards, Wray chief Juſtice, Anderſon and Periam Aſſiſtants to him; the Caſe was, That Wiſeman was ſeiſed of certain lands holden by Knights-ſervice in Capite, had iſſue by a former wife who died; and made a Feoffment in Fee to the uſe, of her who ſhould be his wife, for life, and afterwards to the uſe of himſelf and of his iſſue of the body of ſuch wife to be begotten, the remainder over; Wiſeman took a wife, and had iſſue, and died; If now, living the wife, the iſſue ſhall be in Ward, was the queſtion? It was argued by Coke, That he ſhall not be in Ward: And firſt, it was agreed of both ſides, and alſo by the Juſtices, That it was a remainder, and not a reverſion; and that at the common Law, the deſcent of a remainder, during the Eſtate for life, doth not entitle the King unto Wardſhip,; and there we are to ſee, If upon the Statute of 32 H. 8. the laſt branch of it; where two, or more perſons hold any lands of the King by Knights-ſervice, joyntly to them and the heirs of one of them, and he that hath the Inheritance thereof dieth, his heir being within age, in every ſuch Caſe, the King ſhall have the Ward, and marriage of the body of ſuch heir, ſo being within age, the life of the Freeholder, or Freeholders of ſuch lands notwithſtanding: See 33 H 6. 14. That the father, to prevent Wardſhip, may alien, and take to him and his ſon, and the heirs of the father, which miſchief was intended to be remedied by the ſaid Statute: But theſe words ſhall not in conſtruction thereof extend further then the words eſpecially, becauſe they croſſe the common Law, and go to charge the Inheritance of others; and therefore they ſhall be taken ſtrictly, and not by equity: as the Statute of Weſt. 2. cap. 40. Cum quis alienat jus uxoris ſuæ, concordat. eſt, Quod de celere ſecta mulieris aut ejus hæredis non differatur propter minorem ætatem hæredis, qui warrantizare debuit, that Statute is taken ſtrictly; for if the Vouchee voucheth over, the ſecond Vouchee ſhall have his age, Quod vide 18. E. 4. 16. Alſo the Statute of Weſt. 1. enacts, That where the Diſſeiſor dieth ſeiſed, the Diſſeiſee have his Writ upon the Diſſeiſin againſt the heir of the Diſſeiſor of what age ſo ever he be: So the heirs of the Diſſeiſee, yet it is holden, 9 E. 3. If the Diſſeiſor Leaſeth for life, and dieth, and the Leſſee be impleaded, and makes, default after default, upon which the heir of the Diſſeiſor prayeth to be received, being within age, he ſhall have his age, notwithſtanding the ſaid Statute, which ſhall be taken ſtrict, becauſe it controlls the common Law, and chargeth the Inheritance of the Subject:

So

So upon the Statute of Weſt. 1. cap. 39. That none ſhall vouch out of the line upon that Statute, although the Tenant to the action againſt whom the Præcipe is brought, is bound by the Statute, yet Tenant by receit is at large, and he may vouch at the common Law: 2 H. 7. 2. 16 H. 7. 1. for theſe Statutes go in abrogement of the common Law, and therefore ſhall be taken ſtrictly: Now, according to this Statute, it is of the ſame nature as the other before remembered, and therefore ſhall not be extended in conſtruction beyond the Letter. As Sir Rowland Hills Caſe, Grandfather, father and ſon, the Grandfather ſeiſed of land, ut ſupra, makes a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of the ſon in Fee, The Grandfather dieth, the father dieth, the ſon ſhall not be in Ward, Cauſa qua ſupra, For this Statute ſhall not be conſtrued by equity, and by it the words thereof, [Preferment of children] ſhall not extend unto the childrens children, but to the children onely of Kings Tenant, who makes the Conveyance: And the words in this Statute [or otherwiſe] ſhall not be intended to other perſons then are remembred in the Statute. There was a Caſe late, where the Statute was conſtrued in ſuch a manner, Quod vide 18 Eliz. 345. Thorntons Caſe; A Lady, ſeiſed of lands in chief, made Conveyance of her lands, for the advancement of her baſtard-daughter, the ſame Conveyance is not within the Statute: See alſo the Lord Powes Caſe, 14 Eliz. Dyer, 313. So in the Caſe of Sir Hugh Calverley, the Law was taken, That where the husband dieth ſeiſed in the right of his wife, and they levie a Fine unto the uſe of the husband and wife, for the advancement of the husband; ſuch Conveyance and diſpoſition is not within the Statute of 32 H. 8. Popham, contrary, And as to the Caſe of making this Statute, it was not to overthrow a foundation, as it hath been ſaid; but it was rather a gratuity of the Subjects to the King for his bounty towards them; for whereas by the Statute of Uſes, Uſes were executed in poſſeſſion, So as the Subjects could not diſpoſe of their lands by their Wills, as before the Uſes: Now, by this Statute, the King was pleaſed to give his Royall aſſent to an Act, by which lands might become deviſable, in reſpect of which, the Subjects added to this Act, the laſt clauſe, to give him Wardſhip, where it did not lye before by the common Law, and that as a recompenſe from the Subjects for the Kings bounty, and therefore it ought to be conſtrued beneficially for the King. And to prevent covin and fraud, was not the ſcope of this Statute; For if three purchaſe lands unto them, and to the heirs of two of them; now it is uncertain whoſe heirs ſhall inherit, for Non conſtat, which of them ſhall ſurvive, and therefore no covin is averrable in ſuch caſe; and yet if the ſurvivor of the two to whom the Fee is limited dieth, his heir within age, ſuch heir ſhall be in Ward: So if ſuch lands be given to two, and to the heirs of him of thoſe two who ſhall firſt come to the Church of Pauls; Now it is uncertain which of them ſhall firſt come to the Church of Pauls, yet if he who firſt cometh to the Church of Paul dieth, his heir within age, he ſhall be in Ward; which Caſes prove, that covin and fraud were not the cauſe of making of this Statute, but onely the thankfulneſſe of the Subjects unto the King for his bounty, as abovesaid; for if this Act had not been made, the Subjects ſhould not have power to diſpoſe of their lands for the advancement of their children, but all ſhould deſcend: So as now the King hath loſt the Wardſhip and Primer ſeiſin of two parts of the lands of his Tenant, and hath alſo loſt the averment of covin, which he had by the common Law, where Eſtates were made by the Kings Tenants for advancement of their children. In reſpect of which loſſes, the Subjects gave unto the King Wardſhip in caſe where the lands continues in Joynture: as to that which hath been ſaid, That this Statute ſhall not be taken by equity, I conceive the contrary; the words of the Statute are, [In every ſuch caſe, i. e. In every like caſe, not onely where two, or more perſons hold

joyntly

joyntly to them and the heirs of one of them, but alſo in every the like caſe; as the Caſe now in queſtion, and in every caſe where the life of him who hath the Freehold, is the ſole impediment, quo minus, the heir hath not the land by deſcent in Demeſne: And it may be reſembled unto the Statute of Marlbridge of Colluſion, which ſpeaks of Leaſes for years, Quas tradere voluerint ad terminum annorum; and yet as Leaſe for life, or Leaſe for years is within the ſaid Statute; for the Statute was made in reſtraint of an ill liberty, that the Tenants had by the common Law in prejudice of their Lords, which ſee 4 E 6. 53. Plowd. & 59. And as to the word [otherwiſe] that may be conſtrued, for payment of his Legacies: And as to equity liberall, the Statute ſpeaks [where many hold, and to the heirs of one;] yet, if two hold, to them and the heirs of one of them, the ſame is within the Statute: And as to Equity reſtrainant, he put this caſe; Land is given to the husband and wife, and the heirs of the body of the wife, who have iſſue, the wife dieth, the iſſue within age, he ſhall not be in Ward; and yet he is within the Letter of the Statute, but becauſe that other matter, That the Eſtate for life, in the husband is an impediment, Quo minus, he ſhall be in Ward: It is a Maxim of the common Law, That the father ſhall have the Wardſhip of the ſon and heir apparent, therefore he ſhall not be within the meaning, although he be within the Letter of the Statute: So, if lands be given to my Villein, and to another, and to the heirs of my Villein, who dieth ſeiſed, his heir within age, I ſeiſe the Villein, and claim the remainder, he ſhall not be in Ward; and yet he is within the Letter of the Statute: But I conceive, in our Caſe, the King ſhall have two Wards, Simul & ſemel, the heir generall of Wiſeman, and the iſſue in tail; the heir generall by the common Law, by reaſon that his father was the Kings Tenant, who diſpoſed of his lands for the advancement of his children; and therefore the Queen ſhall have the third part in Ward: And alſo the heir ſpeciall ſhall be in Ward, for that part of the Statute. And it is no new thing to have two Wardſhips for one and the ſame lands: As 14 H 8. of the heir of Ceſtuy que uſe, and alſo of the Feoffee; and if the Tenant dieth ſeiſed, having iſſue a daughter, who is his heir, the Lord ſeizeth the daughter, and marrieth her, and afterwards a ſon is born; he ſhall have the Wardſhip alſo of him: So of the heirs of the Diſſeiſor and Diſſeiſee; and he ſaid, If lands holden in chief be Leaſed for life, the remainder to A. in Fee, A. dieth, his heir within age, he ſhall be in Ward, and that by reaſon of theſe words in the Statute, [In every ſuch caſe] it is not the ſame Caſe, but the like caſe; for if he who hath the Fee dieth, ſo as the Freehold ſurvives to the other; now the Eſtate becomes as an Eſtate for life, the Remainder over. It was adjourned.

24 *Eliz.* In the Exchequer.

CLXXXIV. *The Lord* Howard, *and the Town of* Waldens *Caſe.*

BEtwixt the Lord Howard and the Town of Walden, the Caſe was, That the King made a Feoffment in Fee of lands, parcel of his Dutchie of Lancaſter, Tenend. in feodi forma, reddend. inde ſibi, & hæredibus ſuis, aut illi cui de jure reddi debet, 10 l. The queſtion was, How, and of whom the Tenure ſhould be? It was argued by Plowden, That it ſhould be holden of the King, as of his Dutchie; he ſaid, The King is not bounden by the Statute, De quia emptores terrarum; but here, upon this Feoffment, the Feoffee ſhall hold of the King, as of his Dutchie: All Grants of the King, notwithſtanding that they be of lands, yet they ſavor of the perſon of the King

and

and his Prerogative being wrapt up in his person; shall guide the disposition of the land; and he said, that this Tenure shall be implied by reason, and in respect of his person: And the Statute of Quia emptores terrarum, extends to Tenants onely, Libere tenentes magnatum & aliorum; but the King is not Libere tenens alicujus magnat. 32 H. 6. 21, 22. The King hath an Advowson in the Right of his Dutchie, to which, being void, he presents; he may repeal his presentment: And he vouched divers presidents of Grants of the King of such lands to hold of him, as of his Dutchie, and sometimes of others: And the King by his Dutchie-seal, may give lands in Mortmain; and the King under his Dutchie-seal, hath made divers Corporations within his Dutchie, And although this Rent be a new thing, never parcel of the Dutchie, yet, because it is issuing out of the Dutchie lands, and reserved thereout, it shall be of the same nature, and accounted parcell of the possessions of the Dutchie: If before the Statute of West. 3. one seised of lands on the part of his mother, made a Feoffment in Fee, Tenend. by such services, and died, the Seignory should go to the heir on the part of his mother, and should be descendable as the land it self, in lieu of which it came: And if Tenant in tail, now after the Statute of 32 H. 8. makes a Lease for years according to the Statute, rendring Rent to him and his heirs, it shall be expounded such heirs which are inheritable to the land, according to the entail. Manwood, chief Baron, Demanded of Plowdon, this Question, The King makes a Feoffment in Fee of lands of his Dutchie, Is the same a matter of Record? who answered, yes. Manwood, Truly no; for then there needed not any livery. Egerton, Solliciter, argued to the contrary, and he argued much upon the Statutes of 1 H. 4. and 1 H. 7. of the separation of the Dutchie of Lancaster from the Crown: which see in the Comment. 215. in the Case of the Dutchie of Lancaster; by which Acts, the possessions of the Dutchie were devested out of the body Politique of the King, and vested in his body naturall, and are as to their corporall holding in the King, as they were in the Duke of Lancaster, being a Subject; who if he had made a Feoffment, the Feoffee should not hold of him, but of the King; Ergo, so shall it be in the case where the King himself makes a Feoffment: and he cited a Case, put in the end of the Dutchie Case, 4 Eliz. 223. The Queen made a Feoffment of lands of the Dutchie out of the County Palatine, to hold of her in Capite; the Feoffee shall hold of her in Capite as of her Crown of England. The case went further; the King, after this Feoffment, granteth the Fee-farm, the Question is, If the Rent reserved upon this Feoffment shall passe by such grant or not: and he said, That this Rent is not parcel of the Fee-farm, but rather a collaterall charge upon the land; for in all cases where there is a Tenure expressed in fait, or implied in Law, there the rent reserved after, shall not be parcel of the Tenure, but a Rent in grosse by it self: As in our case, Tenend. in feod. firm. makes a Tenure; and therefore the Reddend. after shall not make the summe reserved parcel of it: 33. E. 3. Annuity 52. before the Statute of Quia Emptores terrarum; a man makes a Feoffment in Fee, Tenend. de Dominis Capital. rendring the rent of 20 l. that Rent is a Rent in grosse, and not parcel of the Tenure. King E. 6. granted to Cranmer, Archbishop, and his heirs, Tenend. by the fifth part of a Knights-fee, Reddend. 6 l. per ann. Cranmer made a Feoffment in Fee to the use of himself for life, the remainder to the use of his son in tail, the remainder to the use of the right heirs of Cranmer in Fee, who is attainted of Treason, by which the remainder to his right heirs Escheats to the King, and so the Seignorie is extinct; but it was adjudged, That the Rent was in esse, and not extinct by the Escheat of the remainder, for it was not parcel of the Seignorie: So here in our case. Another matter was moved; If this Rent, being a new thing created, de novo, and not parcels of the possessions of the Dutchie, 1. H. 4. nor

1 H. 7. ſhall be accounted in Law in the right of the Crown, or of the Dutchie; and if of the Crown, then it cannot paſſe by the Dutchie-ſeal: and the Statute of 1 H. 4. ſpeaks of ſuch Lands and Tenements which were to his Anceſtors, Dukes of Lancaſter; but this Rent never was in them, &c. and the Queen cannot enlarge the poſſeſſions of her Duthie by her own Act; and therefore, if J. S. being Tenant in Fee-ſimple, be impleaded in a Præcipe quod reddat. and ſaith that he holdeth for life, the remainder to the King in Fee in the right of his Dutchy; now this remainder is veſted in the King in the right of his Crown, and not in the right of his Dutchy; for it is only an Eſtoppel: So the Villein of the King, in the right of his Dutchy, purchaſeth lands, the King ſeiſeth, he ſhall have the lands in the right of his Crown, and not in the right of the Dutchy: If the King giveth Common out of his lands, parcel of his Dutchie, and afterwards makes a Feoffment in Fee of the lands out of which the common is granted, and afterwards the Commoner dieth without heir, the King ſhall have the ſame in the right of his Crown, and not in the right of the Dutchy: So, although the rent doth follow the nature of the lands out of which it is iſſuing, yet it is not ſo to all intents; and he ſaid, That by the Statute of 2 & 3 Phil. & Ma. the King could not enlarge the poſſeſſions of the Dutchy; and therefore by the ſaid Act, authority is given for to annex poſſeſſion unto the Dutchy by Letters Patents; And there is another clauſe in the ſaid Statute, That if any part of the poſſeſſions of the Dutchie have been alienes, or granted unto any ſubject, and are reverted to the Crown by Eſcheat, attainder, forfeiture, purchaſe, &c. they ſhall be deemed and accepted parcel of the Dutchy; which caſe proves, That if the King makes a Feoffment of ſuch lands, the ſame is a Tenure in chief; for if it were a Tenure of the Dutchy, then upon Eſcheat, it ſhould be parcel of the Dutchy again, without the help of that Statute. Now, this Rent being a Rent in groſſe, and not parcel of the Seignorie, Reddendo Domino Regi, hæredibus & ſucceſſoribus ſuis, aut Domino, aut Dominis feodi; Now, when the King grants the Seignorie to the Lord Audley, it hath been moved, that it was in the Election of the Feoffee, to pay the Rent to the King, or to the Lord Audley; but that is not ſo, for although the Law be ſo betwixt Subjects, yet in caſe of the King it is otherwiſe; for the King ſhall never be over-reached by an Election: and therefore he ſhall pay the Rent to the King. It was adjourned.

Hill. 18 *Eliz.* In the Common Pleas.

CLXXXV. *The Executors of Sir* William Cordel *and* Cliftons *Caſe.*

THe Caſe was, The Earl of Weſtmerland, ſeiſed of a Manor, whereof the Demeans were uſually let for three lives, by Copy, according to the cuſtom of the Manor, granted a Rent-charge to Sir William Cordel, Pro conſilio impendendo, for the term of his life; and afterwards conveyed the Manor to Sir William Clifton in tail; The Rent is behind, Sir William Cordel dieth, Sir William Clifton dieth, the Manor deſcends to John Clifton, who grants a Copyhold to Hempſton: The Executors of Sir William Cordel diſtrain for the Rent; It was agreed by the whole Court, That the Copyholder ſhould hold the land charged. Windham, Juſtice, It hath been adjudged, that the wife of the Lord ſhall not be endowed againſt the Copyholder, which Periam granted, but gave the reaſon of it; for the Title of the Dower is not conſummated before the death of the husband; ſo as the Title of the Copyholder is compleated before the Title of Dower; but the Title of the Grantee of the Rent is conſummated

before

before the Dower, Fenner conceived, That the Executors could not diſtrain upon the poſſeſſion of the Copyholder, and he argued, that this caſe is not within the Statute of 32 H. 8. of Reals; For by the preface of the ſaid Statute, he conceived, That the ſaid Statute did extend but to thoſe caſes for which by the common Law no remedy was provided; but in this caſe, the Executors by the common Law, might have an Action of debt, ergo: But Periam and Windham, contrary; For this Statute doth intend a further remedy for that miſchief, (ſcil.) not onely an action of debt, but alſo diſtreſſe and avowry: See the words of the Statute, Diſtrain for the arrerages, *&c.* upon the lands, *&c.* which were charged with the payment of ſuch rents, and chargeable to the Diſtreſſe of the Teſtator; or in the ſeiſin or poſſeſſion of any other perſon or perſons claiming the ſaid lands, only by and from the ſame Tenant by purchaſe, gift, or deſcent, in like manner and form as their Teſtator might or ought to have done in his life time: And it was moved by Fenner, That here the ſaid land charged, doth not continue in the ſeiſin or poſſeſſion of the Tenant; and here Sir John Clifton was iſſue in tayl, and therefore he doth not claim onely by the father, but per formam Doni; and therefore he is not liable; therefore neither his Copyholder.

Shuttleworth, Serjeant, contrary, That Sir John Clifton was chargeable; and he claims onely from them who immediatly ought to have paid the Rent, and the Copyholder claims by purchaſe from Sir John Clifton, ſo he claims from Sir William Clifton the Tenant, &c. although he doth not claim immediately from him: For if the Tenant ought to have paid it, and dieth, and the land deſcendeth to his heir, and the heir maketh a Feoffment in Fee, the Feoffee ſhall be charged within this Statute, although he doth not claim immediately: ſo where land deſcends from the Tenant which ought to have paid it, and ſo from Heir to Heir. The Statute of 1 R. 3. wills, that all grants, &c. ſhall be good againſt the Donor, his Heirs, &c. claiming onely as Heirs to Ceſtuy que uſe, &c. Yet, if Ceſtuy que uſe granteth a Rent-charge, and the Feoffees are diſſeiſed, the Grant ſhall be good againſt the Diſſeiſor; and yet he doth not claim onely by Ceſtuy que uſe: And although Sir John Clifton be Tenant in tail, and claims, per formam Doni; Yet, becauſe the Eſtate tayl cometh under the Eſtate of him who grants the Rent, he ſhall be ſubject to the charge. And this Statute extends not onely to him who claims by the Tenant, but alſo to the Heir of him who grants, &c. And by Windham and Rhodes, The Copyholder doth not claim onely by the Lord, but he claims alſo by the cuſtom; but the cuſtome is not any part of his Title, but onely appoints the manner how he ſhall hold, &c. The poſſeſſion continues here in Sir John Clifton, for the poſſeſſion of his Copyholder is his poſſeſſion; ſo as if the Copyholder be ouſted, Sir John Clifton ſhall have an Aſſiſe: And ſo the ſtrict words of the Statute are obſerved, for the ſeiſin and poſſeſſion continues in Sir John Clifton who claims onely by Sir William Clifton who was the Tenant in demean who ought to pay the Rent. But Fenner ſaid to that; That the ſeiſin and poſſeſſion intended in the Statute, is the very actuall poſſeſſion, (ſcil.) Pedis diſpoſitio, and ſuch a poſſeſſion in which the diſtreſſe may be taken, and that cannot be taken in a Freehold without an actuall poſſeſſion.

CLXXXVI. 19 *Eliz.* In the Common Pleas.

A ſeiſed of land in Fee, by his Will in writing, granted a Rent-charge of 5 l. per an. out of it to his younger ſon, towards his Education and bringing up in Learning; and if in pleading, the Deviſee ought to averre that he was brought up in Learning, was the Queſtion: And it was holden by Dyer, Manwood, and Mounſon, that ſuch averment needs not; for the Deviſe is not conditionall; and therefore, although he be not brought up in Learning, yet he ſhall have the Rent: and the words of the Deviſe, are, Towards his bringing up; and be well knew, that 5 l. per an. would not, nor could not extend to maintain a Scholler in Learning, in diet, apparel, books, &c. and this Rent, although it be not ſufficient to ſuch purpoſe, yet he ſhall have it; And Dyer ſaid, That ſuch a caſe was here: Two were bound to ſtand to the award of certain perſons, who awarded that the one of them ſhould pay unto the other 20 s. per an. during the term of ſix years, towards the education and bringing up of ſuch a one an Infant, and within the two firſt years of the ſaid term the Infant died, ſo as now there needed not any ſupply towards his education; yet it was adjudged, that the yearly ſumme ought to be paid for the whole term after; for the words [towards his education] are but to ſhew the intent and conſideration of the payment of that ſumme, and no word of condition, &c.

Mich. 20 *Eliz.* In the Common Pleas.

CLXXXVII. West *and* Stowells *Caſe.*

IN an Action upon the Caſe, by Thomas West againſt Sir John Stowell, The Plaintiff Declared, That the Defendant, in conſideration that the Plaintiff promiſed to the Defendant, That if the Defendant ſhall win a certain match at ſhooting, made between the Lord of Effingham and the Defendant, then the Plaintiff ſhould pay to the Defendant 10 l. promiſed to the Plaintiff, That if the ſaid L. Effingham ſhall win the ſame match of the Defendant, that then the Defendant would pay to the Plaintiff 10 l. And further declared, That the Lord Effingham won the match, for which the Action is brought. It was moved, that here is not any ſufficient conſideration; for the promiſe of the Plaintiff to the Defendant, Non parit actionem, for there is not any conſideration upon which it is conceived, but is only, Nudum pactum, upon which the Defendant could not have an Action againſt the Plaintiff. And then here is not any ſufficient conſideration for the promiſe of the Defendant. Mounſon Juſtice conceived, that here the conſideration is ſufficient, for here this counter promiſe is reciprocall promiſe, and ſo a good conſideration, for all the communication ought to be taken together. Manwood, Such a reciprocall promiſe betwixt the parties themſelves at the match, is ſufficient; for there is conſideration good enough to each, as the preparing of the Bows and Arrows, the riding or coming to the place appointed to ſhoot, the labour in ſhooting, the travell in going up and down between the marks: But for the Bettors by, there is not any conſideration, if the Bettor doth not give aim: Mounſon, A caſt at Dice alters the property, if the Dice be not falſe; wherefore then is there not here a reciprocall Action? Manwood, At Dice the parties ſet downe their moneys, and ſpeak words which do amount to a conditionall gift; ſcil. If that the other party caſt ſuch a caſt he ſhall have the money.

19 *Eliz.* In the Kings Bench.

CLXXXVIII. Dunnes *Case.*

DUnne poſſeſſed of divers goods in divers Dioceſſes dyed Inteſtate at Briſtow, The Biſhop of Briſtow committed adminiſtration to Jones and his wife, who adminiſtred; and afterwards the Biſhop of Canterbury, by reaſon of his Prerogative, committed adminiſtration to Auſten and Dunne, and they brought an Action of Treſpaſſe againſt Jones and his wife, for taking of the goods of the Inteſtate; It was holden by Wray and Southcote, that the Letters of adminiſtration granted by the Biſhop of Briſtow, were void: Gawdy and Jeofreys, contrary; for the granting of Letters of Adminiſtration, de mero jure, doth belong to the Ordinary; and it might be that neither the Ordinary, nor the parties to whom he granted the Letters of Adminiſtration had notice that the Inteſtate had bona notabilia in another Dioceſſe, and therefore it ſhould be hard to make the Defendants Treſpaſſors; Exception was taken to the Declaration, becauſe it is ſhewed, that the Archbiſhop of Canterbury, by reaſon of his Prerogative, committed adminiſtration, &c. without ſhewing that the Inteſtate had, bona notabilia, &c. but the Exception was not allowed, for ſo are all the preſidents, as the Declaration is here, which all the Clerks in Court did affirm; and afterwards Exception was taken to the Bar, becauſe it is there pleaded, that the Defendant had payd a certain ſumme of money to one A. to whom the Inteſtate was indebted by Bond, and did not ſhew how the Bond was diſcharged as by Releaſe, Acquittance, cancelling of the Bond, &c. And that was holden to be a materiall Exception: For the Defendants in ſuch caſe, ought to ſhew ſuch diſcharge, which is ſufficient, and by which the Plaintiffs may be diſcharged; and for that cauſe the Plaintiff had Judgement to recover.

19 *Eliz.* In the Kings Bench.

CLXXXIX. Kingwell *and* Chapmans *Case.*

IN an Action of Debt upon a Bond, by Kingwel againſt Chapman; The Defendat pleaded, that it was endorſed upon condition, That where divers debates were betwixt the Plaintiff and one J. Brother of the Defendant, the ſaid Plaintiff and J. put themſelves to the award of one Copſton, and the Defendant was bound by Bond to the Plaintiff, that his brother ſhould perform the award of the ſaid Copſton: And the award was, That the ſaid J. ſhould pay to the Plaintiff 30l. viz. At the Feaſt of the Annunciation: 20l. and at Michaelmas after 10l. and ſhewed, that the ſaid J. had payd the ſaid 20l. at the Annunciation; and as to the 10l. he pleaded, That the ſaid J. died before the ſaid Feaſt of Michael s, upon which there was a demurrer: And by Wray, Southcote, and Gawdy, Juſtices, the Bond is forfeit. Firſt, becauſe the ſumme awarded by the Arbitrament, is now become a duty; as if the condition of the Bond had been for the payment of it: Secondly, day is appointed for the payment of it, 10 H. 7. 18. Thirdly, the Executors cannot perform the Condition. But if I be bound by Bond to enfeoff the Obligee at ſuch a day, and before the ſaid day I die, my Executors ſhall not be charged with it; for the Condition is become impoſſible by the Act of God, for the Land is deſcended to the heir

20 *Eliz.* In the Common Pleas.

CXC. Lodges *Case.*

LOdge an Attorney of the Common Pleas, was indebted unto Booth in 34 l. payable at a day to come, and Booth was indebted to Digge in 40 l. Digge, according to the custom of London, attached in the hands of Lodge 34 l. to be paid to him at the day, as part of his debt of 40 l. Lodge brought a Bill of Priviledge, directed to the Mayor and Sheriff of London, and that every person, who had cause of Action against Lodge, Sequatur ad Com. Legem, &c. Si sibi videbitur expedire, &c. At the return of which Writ, Bendloes prayed a Procedendo. And by Harper, Justice, the priviledge shall not be allowed, because that this Attachment is by custom, and not allowable here; and if Lodge should have the priviledge, then is the other party without remedy: And if an Attorney of this place be impleaded in London upon a Conceſſit ſolvere debit. alterius, he shall not have the priviledge. Manwood contrary; For according to the Common Law, Lodge owed nothing to Diggs, but is his Debtor by a custom: And as to the case of Conceſſit ſolvere, there the promise was to the party himself, who brought the Action; and he hath no other remedy, but in the case at Bar, Diggs, who is a stanger, veres Lodge who owes him nothing, having remedy against his proper Debtor, which Dyer granted, and further said, That the priviledge of this Court ought not to be impeached by any custom: And the Preignothories cited a case adjudged in the point; That such a priviledge in the case of one Underhil, and afterwards in the principall Case, the priviledge was allowed.

21 *Eliz.* In the Common pleas.

CXCI. Segar *and* Baintons *Case.*

IN an Action of Treſpaſſe, the Case was, That King Hen. 8. an. 27. of his reign, gave the Manor of D. to Sir Edw. Bainton Knight, and to the heirs males of his body; Sir Edw. Bainton had issue, Andrew his eldeſt son; and the now Defendant his younger son, and died; Andrew Bainton covenanted by Indenture with the Lord Seymore, That the said Andrew Bainton would assure the said Manor to the use of himself for life, the Remainder to the use of the said Lord and his heirs; and the said Lord, in recompense thereof, should assure other lands to the use of himself for life, the remainder to the use of the said Andrew Bainton in tail, who, 37 H. 8. levied a Fine of the said Manor without Proclamations to two strangers, to the uses according to the said agreement, and before any assurance made by the said Lord, the said Lord was attainted of Treason, by which all his lands were forfeited to the King: And afterwards the said Andrew Bainton made a suggeſtion to Queen Mary of all this matter; and upon his humble Petition, the said Queen by her Letters Patents, reciting the said mischief, &c. Et præmiſſa conſiderans, & annuens Petitioni illius, granted to him the Manor aforesaid, and further, De ampliori gratia ſua, did release to the said Andrew Bainton, all her right, poſſeſſion, &c. which came to her, Ratione attincturæ prædict. vel in manibus noſtris exiſtant, vel exiſtere deberent; after which, 5 Eliz. Andrew Bainton levied a Fine to the Plaintiff, with Proclamations, and died without issue, and the Defendant, as issue in tail, entred.

Puckering, Serjeant: Firſt, it is to see, If by the words of the Patent of Queen Mary; viz. De ampliori gratia, &c. the Reverſion in Fee which the

the Queen had, ſhall paſs or not? Secondly, Admitting that the Reverſion doth not paſs, then if the Fine levyed by Andrew Bayton, 5 Eliz. to the Plaintiff, the Reverſion being in the Queen, be a bar unto the iſſue in tayl? For as unto the firſt Fine levyed, 37 H. 8. which was without proclamations, the ſame ſhall not binde the iſſue in tayl, neither as to the Right, nor as to the Entry, for it is not any diſcontinuance, becauſe the Reverſion is in the King; for of things which do not lie in diſcontinuance, Rent common, &c. for ſuch a Fine is a Fine at the common Law, and not within the Statute of 4 H. 7. and ſuch Fine is voyd againſt the iſſue: But if ſuch a Fine without proclamation be levyed of a thing which lieth in diſcontinuance, then ſuch a Fine is not voyd, but voydable by Formedon: and therefore this Fine in the caſe at Bar being levyed without proclamation of Lands entayled, whereof the Reverſion is in the King at the time of the Fine levyed, ſhall not binde the iſſue: and by ſuch Fine the Conuſee hath nothing but a Fee determinable upon the life of Tenant in tayl, which Fee was forfeited to the Queen by the Attainder of the Lord Seymore, and that the Queen moved of pity, did reſtore the ſame to A. B. in recompenſe; for the Indentures of themſelves were not ſufficient to raiſe any uſe: See acc. 1. Mariæ, Dyer 96. As to the firſt point, it ſeems that nothing paſſed of the Reverſion, for the Grant hath reference to the words, All her Right, Poſſeſſion, &c. which came to her ratione attincturæ, and all the reſidue of the Grant ought to have reference to that, to the ratione attincturæ, which was the foundation of the whole Grant: and here the intent of the Queen was not to any other intent, but onely to reſtore A. B. to the ſaid Manor, or to his former Eſtate in it; and nothing appears in the Letters Patents, by which it may appear, that the Queen was knowing of her Reverſion which ſhe had by deſcent, and therefore the ſame cannot paſs by general words. If the Queen grants the Goods and Chattels of all thoſe which have done any Treſpaſs, for which vitam amittere debent, the Goods of him who is attainted of Treaſon ſhall not be forfeited to the Grantee by ſuch general words: 8 H. 4. 2. The King grants omnia Catalla, Tenentium ſuorum, qualitercunque damnatorum, the ſame ſhall not extend to the Goods of him who is condemned of Treaſon: See 22 Aſſ. 49 So in our caſe, the Patent ſhall not ſerve to two intents, but to a reſtitution of the Manor, and then nothing paſſeth by this Patent but the fee determinable, which was conveyed to the Lord Seymore, and forfeited by his Attainder. Then we are to ſee, How after this Grant the ſaid A. B. is ſeiſed? And he ſaid, That he ſhall be in of the ſaid fee determinable, and not of the Eſtate-tayl againſt his own fine; and then if he be not ſeiſed by force of the Entayl at the time of the fine levyed, 5 Eliz. the ſame fine cannot binde the tayl: But admit that at the time of the ſecond fine levyed he was in of an Eſtate in tayl, yet the ſame fine ſhall not bar his iſſue: For firſt, this Fine cannot make any diſcontinuance, becauſe that the Reverſion in fee is in the King, which is not touched by the Fine: See the Caſe of Sanders, where A. makes a Leaſe to begin at a day to come, and afterwards levies a Fine to a ſtranger with proclamations; the five years paſs, and afterwards at the day of the Commencement of the Leaſe the Leſſee enters, his Entry is lawful, and he ſhall not be bound by the non-claim. And ſo it was adjudged 21 Eliz. between Sanders and Starky. After the making of the Statute of 4 H. 7. of Fines, it was much doubted, if the iſſues of common Tenants in tayl ſhould be bound by a fine with proclamation, for as much as upon the death of their Anceſtors they were as new purchaſors per formam doni: and therefore it was provided by the Statute of 32 H. 8. that the ſaid Statute of 4 H. 7. ſhould extend to ſuch common Entayls; but there was no doubt of the Eſtate-tayl of the Gift of the King: and ſee betwixt Jackſon and Darcy, Mich. 15 and 16 Elizab.

Rot.

Rot. 1747. in a Partitione facienda, the caſe was, Tenant in tayl, the Remainder to the King after the Statute of 32 H. 8. levyed a Fine with proclamations, and adjudged, that that ſhould binde the iſſues: and the Act of 32 H. 8. doth not extend, but where the Reverſion is in the King, but no mention is there of a Remainder, becauſe the words of the ſaid Act are general, of all Tenants in tayl, the makers of the ſaid Act perceiving that it might be a doubt, that the generality of the ſaid words might exclude Eſtates-tayl of the Gift of the King, they have reſtrained the words in a ſpecial manner, as appeareth by the laſt words of the ſame Act: For any Fines heretofore levyed, or hereafter to be levyed by any perſon or perſons of any Manors, &c. before the levying of the ſaid Fine to any of his or their Anceſtors in tayl by Letters Patents, or Act of Parliament, the Reverſion whereof, at the time of the levying of ſuch Fine, was in the King: and ſo ſuch Eſtates are excepted, and that in ſuch caſes where ſuch Fines are levyed, they ſhall be of ſuch force as they ſhould have been if the ſaid Act had not been made; and therefore he conceived, it appeared at the ſaid Parliament, That ſuch Eſtate-tayls of the Gift of the King were not bound by 4 H. 7. for otherwiſe that Proviſo or Exception had been friVolous.

Walmſley, Serjeant, to the contrary; and he agreed, That the firſt Fine doth not make any diſcontinuance; and yet he conceived, it is not altogether void againſt the iſſues before that they enter, for no Right remains in the Conuſor againſt his Fine: And he conceived alſo that this clauſe, ex uberiori gratia noſtra, did extend to paſs more then paſſed before, for he conceived that the Queen intended more liberally, viz. the Reverſion, for this ſame is not any matter of Prerogative, but this is a matter of Intereſt which might even in the caſe of the King paſs out of the King by general words: And ſee 3 H. 6. 6 and 7 Br. Patents; A Grant of the King ex inſinuatione ſhall not hinder the force of the words ex mero motu. And the Opinion of the Court was, That the Reverſion which was in the King did not paſs by this Grant: For the ſcope of the whole Patent was, as was conceived, to grant the ſame onely which the Queen had ratione attincturæ.

Anderſon held the Patent inſufficient, becauſe that the perhibition was not full and certain: Alſo he ſaid, That ex ſpeciali gratia, &c. would not help this caſe, if it were well argued, for the Eſtate-tayl is not well recited, but onely that he was ſeiſed de Statut. hæreditario, &c. ſo as the Queen was deceived. Periam contrary; The Queen was appriſed well of the miſchief and Grant aforeſaid, viz. of ſuch Eſtate, with which he departed by the Fine. And as to the other point, it was the Opinion of Walmſley, That the Fine with proclamation did binde the Entayl. And as to the Objection which hath been made, That the Conuſor, at the time of the fine levyed, was not ſeiſed by force of the Entayl, the ſame had been good matter to avoyd a common Recovery, to alledg ſuch matter in the Tenant to the Præcipe, but not to this purpoſe: for if Tenant in tayl levyeth a fine, although he was not ſeiſed at the time of the fine levyed by force of the Entayl, yet ſuch a fine ſhall binde the iſſues: So if Tenant in tayl doth diſcontinue, and diſſeiſeth the Diſcontinuee, and ſo levyeth a fine: and he conceived, That the iſſue in tayl is bound by the Statute of 4 H. 7. even of the Gift of the King. And ſee 19 H. 8. 6 and 7. where it is holden, That the iſſue in tayl is bound by the Act of 4 H. 7. And whereas it hath been objected, That it doth not extend, but to ſuch fines which make a diſcontinuance at the common Law; the ſame is not ſo: for if Tenant in tayl of a Rent or Common levyeth a fine with proclamation, it is very clear, that the iſſues ſhall be barred thereby: And he relied much upon the Book of 29 H. 8. Dyer 32. Tenant in tayl of the

Gift

Gift of the King levyeth a Fine, or ſuffereth a common Recovery, although it be not a diſcontinuance, becauſe the Reverſion is in the King, yet it is a bar unto the iſſue. But note, That that was before the Statute of 34 H. 8. And ſee now Wiſemans Caſe, 27 Eliz. Cok. 2 part. and ſee the Lord Staffords Caſe, 7 Jacob. C. 8 Reports, fo. 78.

21 *Eliz.* In the Kings Bench.

CXCII. Pleadalls *Caſe.*

THe Caſe was, That a man ſeiſed of Lands in fee, took a Leaſe by Indenture of the Herbage and Pawnage of the ſame Land: It was the Opinion of the whole Court, That the ſame was no Eſtoppel to him to claim the Soyl or the Freehold: And it was ſaid by Plowden, and agreed by the Court, That if the Father and Son be Joynt-tenants for an hundred years, and the Son takes a Leaſe of his Father of the Lands for fifteen years, to begin, &c. the ſame ſhall conclude the Son to claim the whole term or parcel of it by Survivor.

CXCIII. 21 *Eliz.* In the Star-Chamber.

NOte, That in the Star-Chamber it was reſolved, by the Advice of many of the Juſtices, That an Infant having levyed a Fine, may declare the uſes upon it, and ſuch Declaration is good, notwithſtanding his Nonage: and Mr. Plowden affirmed, that ſo it was adjudged in his own Caſe, by which he loſt Lands of the yearly value of 40 l. So a Declaration by a man in dureſſe is good, which Anderſon denyed.

21 *Eliz.* In the Court of Chancery.

CXCIV. *The Lord* Awdleys *Caſe.*

THe Lord Awdley, 12 H. 7. enfeoffed Hoddy and others of certain Lands in the County of Sommerſet, and afterwards by Indenture reciting the ſaid Feoffment, and the date of it, and alſo that it was to the intent that his Feoffees ſhould perform his Will, as follows in effect; viz. My Will is, That my ſaid Feoffees ſhall ſtand ſeiſed to the uſe, That the ſaid Hoddy ſhall receive of the yearly Profits of the ſaid Lands one hundred pounds, which he had lent to the ſaid Lord Awdley: and alſo ſtand ſeiſed to pay all his Debts upon Bills ſigned with his Hand; and after the Debts payd, That the ſaid Feoffees ſhall make Eſtate of the ſaid Lands unto him the ſaid Lord Awdley, and Joan his Wife, and to the Heirs of their Bodies, &c. with divers Remainders over. The ſaid Lord had iſſue by the ſaid Joan; and alſo had iſſue by a former Wife a Daughter: The Feoffees never made any Eſtate to the ſaid Lord and his Wife. And it was the Opinion of divers of the Juſtices and Sages of the Law, That upon this matter no uſe was changed, for it is not a laſt Will, but an Intent. And although that the Feoffees ſhall be ſeiſed unto the uſe of the Feoffor and his Heirs, becauſe that no conſideration was, for which they ſhould be ſeiſed to their own uſe;

yet

yet the ſame cannot make a new uſe unto the ſaid Lord and his wife in tail, without conveying an Eſtate; for the wife is a ſtranger unto the land, and alſo to the other uſe. And it cannot be a Teſtament or laſt Will; for the Eſtate mentioned in the ſaid Writing, ought to be made by the ſaid Lord and his wife, who cannot take by his own Will. And this matter was depending in the Chancery; and the advice of the Juſtices being there required, they did deliver their opinions, That by this Writing, no uſe was changed, nor any Eſtate veſted in the ſaid Lord and his wife; and a Decree was made accordingly, until proof might be made of ſuch an Eſtate made.

21 *Eliz.* In the Kings Bench.

GLXCV. Borough *and* Holcrofts *Caſe.*

Coke ſupra 7. 33. b.

IN an Appeal of Murder, by the ſon of the Lord Borough, of the death of his elder brother, Henry Borough, againſt Thomas Holcroft, who pleaded, That heretofore he had been indicted of the Murder of the ſaid Henry Holcroft before J. S. Coroner of the Verge, and alſo Coroner of the County of Middleſex, within which County the Verge was; and upon that indictment he was arraigned, and confeſſed the indictment, and prayed his Clergie, &c. and demanded Judgement; If the Plaintiff ſhould have this appeal? The Plaintiff, Replicando, ſaid, by proteſtation, Nul tiel record, and for plea did demur in Law. Dalton, for the Plaintiff, took Exception to the plea, for the concluſion of it, viz. Judgement if appeal; where it ought to be, Judgment, if he ſhall be again put to anſwer: And he took a difference, where a matter is pleaded againſt the Plaintiff, to which the Plaintiff is party: As where a man pleads a Fine levied by the Plaintiff himſelf, there he ſhall conclude Judgement if action; but where the Fine is pleaded levied by the Anceſtors of the Plaintiff, there he ſhall plead, Judgement, if againſt ſuch Fine, &c. Vide, 9 H. 7. 19. At the common Law before the Statute of 3 H. 7. ſuch conviction at the ſuit of the King did diſcharge the party convicted from further trouble; but if the indictment upon which he was arraigned be inſufficient, then it is not any plea. And here the indictment is inſufficient; for by the Statute of Articulis ſuper Chartas, cap. 3. the Coroner of the Country, together with the Coroner of the Kings Houſhold ſhall do the Office which belongs, and ſend the roll, to which Office two Coroners are requiſite; but here, in the taking of this inquiſition there was but one perſon although two capacities, id eſt, Coroner of the County, and alſo Coroner of the Verge; and ſo the Indictment was taken, Coram non Judice: See the Statute of the Star-chamber, which is, That the Chancellor, &c. calling to them one Biſhop, and one temporall Lord of the Kings Councel, &c. If the Chancellor be a Biſhop; yet another Biſhop ought to be called, &c. If I deviſe that my lands ſhall be ſold by two Biſhops, and J. S. hath two Biſhopricks, yet his ſale is not ſufficent. Egerton, contrary, Although here is but one perſon, yet there are two Coroners: Quando duo jura concurrunt in una perſona æquum eſt, ac ſi eſſent in diverſis. At the common Law, before the Statute, De Articulis ſuper Chartas, The Coroner of the Verge by himſelf might enquire of Murder; but becauſe the Kings Court oftentimes removed into another County, by reaſon whereof no enquiry could be made, for the remedying thereof, that Statute was made, which is in the affirmative, and doth not abridge the common Law before, and therefore it ſhall have a reaſonable conſtruction: See the Statute of Weſt. 1. cap. 10. By which it is enacted, that ſufficient men ſhall be choſen Coroners, of the moſt loyall and the moſt

ſage

ſage Knights, this Statute ſhall not be taken, Stricto ſenſu. that none ſhall be choſen Coroners, but Knights; but the Statute requires, that ſufficient perſons ſhall be choſen. As to the Statute of 3 H. 7. It is to be known, That at the common Law [before acquitted] was a good Plea, and the cauſe was for the great regard that the common Law had to the life of a man; In which caſe a great miſchief, as the Statute recites, did enſue, that to ſave the appeal of the party; they would not arraign the party within the year and day after the murder, within which time, the offender did compound with the party intereſſed; and ſo, after the year expired, all the matter concerning the proſecution, at the Kings ſuit, was put in oblivion: wherefore it was enacted, That ſuch offender ſhall be within the year arraigned at the ſuit of the King; and if the party be acquitted at the Kings ſuit, within the year and day, That the Juſtices before whom, &c. ſhould not ſet the party at large, but to remaine in priſon, or to let him to bail, untill the year and the day be paſt; and within the ſaid year and day, the wife, or next heir to the party ſlain may take their appeal againſt the party ſo acquitted or attainted, the ſaid acquitall or attainder notwithſtanding; and he ſaid, that theſe words [perſon attainted] did not extend to perſon convicted; for they are two diſtinct conditions in Law, for attainder procures corruption of blood, but the ſame is not wrought by conviction; and every Treaſon imports in it ſelf Felony; but yet notwithſtanding they are diſtinct Offices: See 22 E. 4. Coron. 44. where it was ordered by all the Juſtices of England, That none ſhould be arraigned of the death of a man, at the ſuit of the King, within the year and day; ſo as the ſuit of the party be ſaved. And the Juſtices counſelled all men of Law ſo to do, and that the ſame be executed as a Law without alteration, upon which rule of the Juſtices, aroſe an inconvenience; for after that order of the Juſtices was known, The offender would practiſe with the party to whom the appeal by the Law belonged, to obtain from him a releaſe for ſome ſumme of money, and then when the year and day paſſed, the heynouſneſſe of the murder was out of memory; This miſchief being eſpied, was the occaſion of the making of the Statute of 3 H. 7. But the ſaid Statute doth not meet with our Caſe; but our Caſe is at the common Law, for this Statute extends only unto perſons attainted; but a perſon convicted is not touched by it, and therefore being out of the words of the Statute, it ſhall be alſo out of the meaning of it; for being a penall Law, it ſhall not be taken by equity, as all Statutes which give attaint ſhall be, Stricti juris, and ſhall not be taken by equity. It hath been objected, that the Statute de Frangentibus priſonam, 4 E. 1. hath been taken by equity, the ſame is not ſo; for it is not any penall Law, but the ſame mitigates the rigor of the common Law; for before that Statute, the breaking of the priſon, was Felony in every caſe, but now it is not Felony; but where the party was committed to priſon for Felony, &c.

CXCVI. 21 *Eliz.* In the Common Pleas.

IN a Formedon of a Manor, the Tenant pleaded, Joynt-tenancy by Fine with J. S. The Demandant did averre the Tenant ſole Tenant, as the Writ doth ſuppoſe, and upon that iſſue was taken, and found for the Demandant; upon which, a Writ of Error was brought, and Error aſſigned in this, That where upon Joynt-tenancy pleaded by Fine, the Writ ought to abate without any averment by the Demandant againſt it, the averment hath been received againſt the Law, &c. Southcote, At the common Law, If the Tenant had pleaded Joynt-tenancy by Deed, the Writ ſhould abate without any averment; but that was remedied by 34 E. 1. but Joynt-

tenancy by Fine did remain as it was at the common Law, for he hath punishment enough in that by that plea, if it be false, he hath by way of conclusion given the moyetie of the land in demand to him with whom he hath pleaded Joynt-tenancy; and the Law doth not intend that he would so slightly depart with his land for the abatement of a Writ: As in a Præcipe quod reddat, the Tenant acknowledgeth himself to be Villein to a stranger; the Writ shall abate without any averment, if Frank and of Frank Estate; for the Law presumes, that the Tenant would not enthrall his condition. Wray, to the same intent: But the Demandant may confesse and avoid the Fine, as to say, That he that levyed the Fine was his disseisor, upon whom he had before entred, &c. And if Tenant in Fee-simple be impleaded, and he saith that he is Tenant for life, the remainder over to A. in Fee, and prayes in aid of A. the Demandant shall not take averment, that the Tenant, the day of the Writ purchased, was seised in Fee. Note, that in this fine Joynt-tenancy, was pleaded but to parcel. It was holden by Wray and Southcot, that the whole Writ should abate; As in a Writ the misnomer of one shall abate the whole Writ against all the Defendants: and so where the Demandant enters into parcel of the land in demand, if the thing in demand be one entire thing, it shall abate the whole Writ. In this Case, the Demandant ought to have in his Writ, Du forsprise of the land in demand, whereof the Joynt-tenancy by Fine is pleaded, per availe, and under the gift of which the Formedon is conceived, and therefore in respect of the title of the Demandant, it remains in right, parcel of the Mannor, and therefore ought to be demanded accordingly with an Exception: But if A. give to B. a Mannor, except ten acres in tail, there, if after upon any discontinuance, the tithe in tail to have a Formedon, in such case there needs no exception, for the said ten acres were never after the gift, parcell of the Mannor which was given in taile, for they were severed from the Mannor upon the gift; but if land in demand was severall, as twenty acres but two, an exception is not good, for he might demand eight acres: See E. 1. F. N. B. 866. Præcipe, unam bovat. terræ, except a Seleon, and the Writ was abated, for every demand ought to be certain, but a Seleon is a parcell of land uncertain, as to quantity, in some places an acre, in some more, in some lesse. Another point was, That because the Tenant hath admitted and accepted this averment, (scil.) sole Tenant, as the Writ doth suppose; If the Court notwithstanding the admittance of the Tenant ought without exception of the party, Ex officio, abate the Writ; and Wray conceived, that they should, for it is a positive Law; as if a woman brings an appeal of murder upon the death of her brother, and the Defendant doth admit it without challenge or exception, yet the Court shall abate the appeal, 10 E. 4. 7. And see the principall Case there, Non ideo puniatur Dominus; and if an Action be brought against an Hostler upon the common custom of the Realm, and in the Writ he is not named common Hostler, and the Defendant doth accept of such Writ, without exception to it, yet the Court shall abate the Writ, Ex officio, 11 H. 4. 198. and 38 H. 6. 30.

CXCVII. 24 *Eliz.* In the Kings Bench.

THe Case was this: King Henry the 8. seised of certain lands in the right of his Dutchie of Lancaster, Granted them unto another, Tenend. in Fee-farm, Reddend. dicto Dom. Regi, & hæredibus suis, aut illi cui de jure reddi debet 10 l. And if this land should be holden of the King in Capite, or holden of the Dutchie, was the question? Egerton Sollicitor generall, argued much upon the Statute of 1 H. 4. by which the Dutchie and possessions thereof were severed from the Crown: See Plowden in the Case

Caſe of the Dutchie of Lancaſter, 213. And ſee ibid. the Statute of 1 H. 4. Entituled, Charta Regis, Hen. 4. 1. De ſeparatione Ducatus Lancaſtr. a Corona; by which it is enacted, That the Dutchie of Lancaſter, taliter & tali modo deducantur gubernentur & pertractentur, &c. ac ſi ad culmen dignitatis Regiæ aſſumpti minime fuiſſemus: So as by that Act the Dutchie is diſ-joyned from the Crown, and in ſuch point as to poſſeſſion, as it was in a common perſon. But the poſſeſſion of the Dutchie doth not binde the perſon of the King: as 10 H. 4. 7. The King brings an Action for certain lands to him deſcended from his Uncle, the Duke of Lancaſter, and the Writ was, Non omittas propter aliquam libertatem, and exception was taken to the Writ, becauſe that ſuch clauſe ought not to be in the Kings Writ, but where the King ſueth as King, but that Writ he ſueth as Duke of Lancaſter, but the exception was not allowed; The King cannot ſue otherwiſe, but as King: for the perſon of the King ought not to be meaſured according to his poſſeſſion, ſo as it was a ſeverance in Order, ſurvey, government and proces, and not in reſpect of the perſon. But after the Statute of 1 H 4. The ſaid Act of Separation was repealed; and further enacted, that the ſaid King ſhould hold the ſaid Dutchie to him and his heirs, Kings of England; ſo as thereby the Dutchie is ſetled in the politique Body of the King: afterwards came the Statute of 1 H. 7. by which it is enacted, That the King ſhall hold the ſaid Dutchie, and the poſſeſſions thereof, in ſuch manner and form, and ſo ſeparated from the Crown as King Henry the fourth, King Henry the fifth did hold the ſame, ſo as the Dutchie was deveſted out of the Body politique of the King where it was ſetled, 1 H. 4. and veſted in the Body naturall of the King; ſo as the poſſeſſion of the Dutchie, as to their government, &c. are in the King, as they were in the Duke of Lancaſter before he was King: and if the Duke of Lancaſter had made a Feoffment, &c. the Feoffee ſhould not hold of him but of the King: So if the King himſelf maketh a Feoffment of lands of the Dutchy, the Feoffee ſhall hold of the King, &c. which ſee in the Dutchie of Lancaſters Caſe, in the end of it: And he conceived, That notwithſtanding the union of the Crown and the Dutchie, yet the privity of the Tenure doth remain, being preſerved by the ſaid Act of 1 H. 4. Another matter was, That here, the Tenure reſerved is Tenend. in feodi firma Reddend. 10 l. &c. And he ſaid, that this Rent is not parcel of the Tenure, but rather a Rent-charge collaterall to the Tenure: For in all Caſes where there is a Tenure expreſſed in ſuit, or implied in Law before, there Reddendo following ſhall not make the thing rendred parcel of the Tenure, but it ſhall be a Rent in groſſe; and here Tenend. in feodi firma, makes the Tenure, &c. and the Reddendo after ſhall not make the Rent reſerved parcell of the Tenure: See the Caſe 33 E. 3. Annuity 52. before the Statute of Quia Emptores terrarum, a man makes a Feoffment in Fee Tenend. de Dom. Capital. feod. &c. Reddend. 10s. Rent; here, becauſe that the Tenure was reſerved, Capital. Dom. feodi illius, this Rent reſerved is not parcel of the Tenure, but a Rent in groſſe: King Edw. the 6. gave certain lands to Cranmer, Archbiſhop of Canterbury, Tenend. by the fifth part of a Knights Fee, Reddend. inde 6 l. per an. Cranmer made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of his eldeſt ſon in tail, the remainder to the right heirs of Cranmer, who is attainted of Treaſon, by which the remainder in Fee eſcheated to the King, by which the Seignorie is gone. But it was adjudged, that notwithſtanding that eſcheat, the Rent did remain, for the Rent was not parcel of the Seignorie. Now this Rent being a thing newly created, and not parcel of the poſſeſſions of the Dutchie in 1 H. 4. nor ever deſcended from any Anteſtor of the King, being Duke of Lancaſter, ſhall be accounted to be in the King in the right of his Crown, and ſo cannot paſſe by the Dutchie-ſeal: See the ſaid Statute of 1 H. 4. and the King cannot enlarge the ſaid Dutchie, nor the

poſſeſſions thereof beyond the poſſeſſions which were of the Dutchie at the time of the making of the ſaid Acts: As if J. S. ſeiſed in Fee is impleaded, and he ſaith, that he holds the lands in demand for life, the remainder to the King in the right of his ſaid Dutchie; now the ſaid remainder is veſted in the King, not in the right of the ſaid Dutchie, but in the right of his Crown. The Villein of the King, in the right of his Dutchie of Lancaſter, purchaſeth lands, the King ſeizeth, he ſhall be ſeiſed thereof in the right of his Crown, and not of the Dutchie: The King grants Common out of certain lands parcel of his ſaid Dutchie, and afterwards makes a Feoffment of the ſaid lands to another, the Grantee of the Common dieth without heir, ſo as the Common eſcheats to him; now he ſhall have the Common in the right of the Crown, and not of the Dutchie; ſo although it is ſaid, That the Rent ſhall follow the nature of the land out of which, &c. yet the ſame is but to ſome intents, and not to every intent: See the Statute of 2 and 3 Phil. & Ma. cap. 20. by which it is enacted, That all the lands which have been granted or ſevered from the Dutchie to any perſon or perſons, and after ſuch grant, have come or reverted to the King in poſſeſſion, reverſion, or remainder, or otherwiſe by attainder, eſcheat, forfeiture, &c. ſhall for ever be united to the ſaid Dutchie, and ſhall be adjudged and eſteemed as part and member of the ſame; which proves that ſuch lands were not holden of the King, as Duke of Lancaſter, but as King; for if they had been holden of the Dutchie upon the eſcheat, they ſhould be parcel of the Dutchie again, without help of that Statute. See the ſpeciall Reſervation; Reddendo Domino Regi, & hæredibus ſuis, aut illi cui de jure reddi debet, &c. Now, when the King grants the Seignorie to the Lord Audley, it was in the Election of the Tertenant, to whom he would pay the Rent, if it had been in the caſe of a common perſon; but it is otherwiſe in the caſe of the King: As if A. holdeth of two ſeverall Lords by owel Feoffment, and dieth, his heir within age; the Lord which firſt gets the Ward ſhall have him; but in the caſe of the King it is otherwiſe: Plowden, The King is not bound by the Statute of Weſt. 3. But in this Caſe, in the making of this Feoffment with this Tenend. & Reddend. the Feoffee ſhall hold of the King as of his Dutchie; for all grants of the King favor of the perſon of the King; and then his Prerogative wrapt in the perſon, ſhall guid the ſame: and ſee the Statute of Weſt. 3. extends to all who make Feoffments, Tenend. de Feoffatoribus; but the King is not Tenent to any one. And if the King be ſeiſed of an Advowſon in the right of his Dutchie, and the ſame becomes void, and the King preſents to the ſame, he may repeal his preſentation: and he vouched divers preſidents, of Patents made to many great Lords, to hold of the Dutchie, and alſo to hold of others: And the King by his Dutchy-ſeal may give lands in Mortmain. And he argued, That this Rent, although newly created, yet in ſo much as it came, and accrued in reſpect of the land which was parcell of the Dutchie: it ſhould be ſo accounted alſo parcel of the Dutchie; as if before the Statute of Weſt. 3. A. ſeiſed of lands in Fee, of the part of his father, makes a Feoffment in Fee, Tenend. by ſuch ſervices, &c. the ſame Seignorie ſhall go to the heirs of the part of the father, in lieu of which the Seignorie is come: Tenant in tail after the Statute of 32 H. 8. makes a Leaſe for years, according to the ſaid Act, rendring Rent to him and his heirs, it ſhall be intended, heirs in tail. It was adjourned.

Paſch.

Paſc. 26 *Eliz.* In the Kings Bench.

CXCVIII. Forſter *and* Walkers *Caſe.*

IN an Ejectione firmæ, by Forſter againſt Walker, the Caſe was; That Richard Meager was ſeiſed of a houſe in *London*: and 6 E. 6. he deviſed the ſame to his wife for life, the remainder to John his ſon in tail, the remainder to the Maſter and Wardens of the Corduaynors in London, and died; the wife entred, and died, John died, The Maſter, Wardens, and Communalty of the Corduaynors entred, and leaſed to the Plaintiff, upon whom the heir generall of the Deviſor did enter. The onely queſtion was? In as much as the Corduaynors of London are incorporated by the name of Maſter and Wardens, and Communalty of Corduaynors. If this deviſe made to them by the name of Maſter and Wardens of the Corduaynors of London be good or not? It was argued by Daniel, That the Deviſe by the manner was good enough; and he inſiſted much upon the favor which the Law gives to Wills, and to Legatees in the deviſes, and conſtruction of them, even in Deviſes and Grants to Corporations: and as to Grants to Corporations, he cited the Caſe of the Dean and Chapter of Norwich: Decanus & Capitula ſanctæ & individuæ Trinit. and they make a Leaſe, leaving out theſe words [ſanctæ & individuæ] and yet held the Leaſe was good, notwithſtanding that, for the words left out, are not words of ſubſtance of the name, but for the beauty and ornament of it: But in the caſe of Deviſe, if the name be miſtaken in matter of ſubſtance, yet if upon the deviſe the intent of the Deviſor ſufficiently appeareth, it is good enough: for the intent of the Deviſor ſhall guide the deviſe; and therefore by deviſe, the Fee-ſimple ſhall paſſe without the word (Heirs.) And he ſaid, that the opinion of Wray, chief Juſtice, was in the caſe of the Dean of Pauls: If I deviſe that my Executors ſhall aſſign my lands to J. S. the ſame, implicative, is a deviſe of the lands themſelves to my Executors; for otherwiſe they could not aſſign. So, if I Will and Deviſe, That A. ſhall pay yearly out of my Manor of D. to J. S. 10 l. the ſame is a good deviſe of the lands to A. So if in the Caſe at Bar this houſe had been deviſed to the Corduaynors by the name of the Society of Corduaynors, ſuch deviſe had been good enough: Cooper contrary; and he ſaid, That the intent of the Deviſor ought to agree with the Law, otherwiſe the Judges are not to regard it in point of Judgement; and he put the caſe of 39 H. 6. 10. A. deviſeth his lands, and afterwards is diſſeiſed, and before any entry dieth; now, notwithſtanding the intent of the Deviſor, the deviſe is void; and he ſaid, The defect of a Will in words, in making of an Eſtate ſhall be ſupplied by intent, but the defect in words, in naming of the Deviſor, or Deviſee ſhall never be ſupplied, See 49 E. 3. 3 & 4 the Caſe of the Whitavers. And he cited a caſe, 25 H. 8. A ſtranger of the Low-countries being made a Denizen in England, returned into his Countrey, and dwelling there became ſick; and in making of his Will, he was adviſed by Councel, that by deviſe of all his goods, his lands deviſeable would paſſe, and therefore by ſuch words he declared his Will with the intention aforeſaid; (ſcil.) to paſſe his lands, and died, and afterwards the States of the Low-countries wrote unto King Henry the 8. acquainting him with the intention of the Deviſor, and alſo of the opinion of their Laws there upon the ſaid Will, and all in favor of the Deviſee; whereupon the King referred the conſideration of the matter to Norwick, then Lord chief Juſtice, who declared his opinion to the King to be, That by that deviſe, the lands did not paſſe, notwithſtanding the intent of the Deviſor.

Paſch.

Pasch. 26 *Eliz.* In the Kings Bench.

CXCIX. Crabdells *Case.*

CRabdel was bound by Recognizance to his good behaviour; upon which the Queen brought a Scire facias, and surmised, that after the Recognizance acknowledged, the said Crabdell was arrested and taken by the Constable for suspicion of Felony, and of his own wrong escaped: It was objected on the part of Crabdell, because it is not alledged by matter in fact, that a Felony was committed. But the whole Court was of a contrary opinion; For it is not materiall, if the Felony were committed or not; for if a Subject be arrested by a lawfull Officer, it is not lawfull for him to escape; but he ought to stand to the Law, and to answer unto the matter with which he is charged. And so Crabdell was forced to answer.

Pasch. 26 *Eliz.* In the Kings Bench.

CC. Basset *and* Prowes *Case.*

IN Debt upon a Bond, the Case was, That Basset was bound with Prowe as his surety, to one Preston, in a Bond of 500l. and that was upon a corrupt and usurious Contract against the Statute; and Prowe was bound unto the Plaintiff in a Bond as a counter-bond, to save the Plaintiff harmlesse from the said Bond of 500l. Basset is sued by Preston upon the said Bond, and so damnified: and thereupon sued Prowe upon the counter-bond, who pleaded against Basset, the Statute of Usurie, pretending that all assurances depending upon such usurious contract, as void by the Statute; but by the opinion of Wray, chief Justice, The same is no Plea, for the Statute is, That all Bonds, collaterall assurances made for the payment of money lent upon Usury, shall be utterly void; But the Bond here upon which the Action is brought, was not for the payment of the money lent, but for the indempnity of the surety.

Pasch. 26 *Eliz.* In the Exchequer.

CCI. *The Vicountesse* Bindons *Case.*

Moor 213 S.C. Cro. Car. 347 W. Jones 332 1 Roll ab. 911.

THe Executors of Thomas, late Viscount Bindon, brought Detinue in the Exchequer against the widow of the said Viscount, and declared upon the detainer of certain Jewels, The Defendant did justifie the detainer of them as her Parophornalia: And it was said by Manwood, chief Baron, That Parophorn. ought to be allowed unto a widow, having regard unto her degree; and here the husband of the Defendant being a Viscount, 500 marks is a good allowance for such matter.

Pasch. 26 *Eliz.* In the Kings Bench.

CCII. Offley *and* Johnsons *Case.*

OFfley and Johnson were bound as sureties with one A. to B. who recovered against Johnson in London, and had Execution against him; and

and now Johnſon ſued Offley, to have of him contribution to the ſaid Execution, ut uterque eorum onoretur pro rata, according to the cuſtom of London: Offley removed the Cauſe by priviledge into the Kings Bench, whereupon came Johnſon, and prayed a Procedendo; and becauſe upon this matter no Action lieth by the courſe of the Common Law, but onely by cuſtom in ſuch cities, The cauſe was remanded; for otherwiſe the Plaintiff ſhould be without remety: See the Book of Entries, 160.

Paſc. 26 *Eliz.* In the Kings Bench.

CCIII. Litchfield *and* Cages *Caſe.*

IN an Ejectione firmæ, the parties were at iſſue; and by the order of the Court, the Triall was ſtayed, and yet the Plaintiff againſt the Order, did privily obtain a Niſi Prius, of which, Gawdy, Juſtice, being informed of it after the Term, awarded a Superſedeas unto the Juſtices of Aſſiſe, before whom, &c. and yet notwithſtanding that, the Enqueſt at the inſtance of the Plaintiff was taken, and found for the Plaintiff; and all this matter was ſhewed to the Court in the Kings Bench, and there examined and proved, and it was ordered by the Court, that the Verdict ſhould not be entred of Record, nor any Judgement upon it: And ſo it was put in ure in a Caſe between Vernon and Fowler. And then the Plaintiffs Councell took exception to the Superſedeas, becauſe it was not ſubſcribed with the hand of Gawdy, but, non allocatur: for the Seal is ſufficient.

Paſch. 26 *Eliz.* In the Kings Bench.

CCIV. Scotts *Caſe.*

WIlliam Scott was indicted upon the Statute of 23 Eliz. of Recuſants, by the name of William Scot of Southwark, Gent. and upon that Indictment Judgement given for the Queen; upon which Scot brought a Writ of Error, and aſſigned for Error: That in the Indictment Scott is not named of any Pariſh, but generally of Southwark; for within Southwark, there are divers Pariſhes, and by the ſaid Statute it is ordained that the penalties accruing by the ſaid Statute ought to be divided in three parts, whereof one part is to be applied to the relief of the poor reſident in the Pariſh where the offence was committed, and therfore it ought to appear upon the Indictment of what Pariſh the party Indicted is, or otherwiſe, Non poteſt conſtare Curiæ, to which Pariſh the third part of the Penalty doth belong, ſo that full execution may be made according to the Statute: But the whole Court was cleer of opinion, That the Indictment is good-enough, notwithſtanding that Exception; for all the penalty which accrues by the ſaid Statute, belongs firſt to the Queen; viz. a third part thereof to her own uſe, another third part for the relief, ut ſupra, to be delivered by Warrant by the Officers of the Receit of the Exchequer. And afterwards the Inhabitants of the Pariſh in which the offence was committed, are to ſue in the Exchequer for their third part of the penalty, and ſurmiſe in their Bill, that the offence was committed within their Pariſh; and Rule was entred accordingly.

Paſch.

Paſch. 26 *Eliz.* In the Common Pleas.

CCV. Gerrards *Caſe.*

GErrard, Maſter of the Rolls, preſented Chatterton, Biſhop of Cheſter, to the Church of Bangor; to which Church, one Chambers alſo preſented his Clerk, by which ſeverall preſentments the ſaid Church became Litigious: The Archbiſhop of York being, loci illius Ordinarius, awarded a Jure Patronatus, &c. depending whith, the Archbiſhop admitted the ſaid Biſhop; whereupon Chambers Libelled in the Spirituall Court againſt the ſaid Biſhop, becauſe the ſaid Archbiſhop, Dicto Epiſcopo plus æquo favore admiſit. dictum Epiſcopum, pendente the Jure Patronatus, in which caſe, by the Law of the Church, the admittance is void; For, Lite pendente, nihil movetur: and now came the ſaid Biſhop, and prayed upon that matter a Prohibition, which was granted, becauſe that the right of the Patronage came in debate, after which came the ſaid Chambers, and prayed conſultation, becauſe he did not meddle with the right of the Patronage, but onely with the tortious admittance. To which it was ſaid by the Court, That the awarding of the Jure Patronatus, is not a thing of neceſſity, but at the will of the Ordinary, and for his better inſtruction; but if he will at his peril, take notice of the right of the Patronage, he may admit which of them he will, without a Jure Patronatus awarded: And it may be in this Caſe, that after the Jure Patronatus awarded, and before any Verdict given upon it, the Archbiſhop was ſatisfied of the right of the now Plaintiff in the Prohibition to the Patronage, and thereupon admitted the Clerk, &c. and if he was deceived to ſubject himſelf unto a Quare Impedit, whereof he had diſcharged himſelf, if he had attended the Verdict in the Jure Patronatus: and by the cleer opinion of the Court, the Conſultation was denyed.

Mich. 29 & 30 *Eliz.* In the Common Pleas.

CCVI. Barker *and* Taylors *Caſe.*

THe Caſe was; That a woman, Tenant in tayl, within the Statute of 11 H. 7. accepted of a Fine, Sur Conuſans de droit come ceo, &c. and by the ſame Fine, rendred back the lands to the Conuſor for 100 years. It was moved, If this conveyance and diſpoſition be within the penalty of the ſaid Statute; for the Statute ſpeaks of Diſcontinuances, &c. And it was the cleer opinion of the whole Court, That it is within the Statute; for by ſuch practice, the meaning of the Statute might be defeated: and if ſuch a render for 100 years ſhould be good, by the ſame reaſon, it might be for 1000 years, which is like miſchievous, and as dangerous unto him in the reddition, as a Diſcontinuance: And by Rhodes, Juſtice, It hath been adjudged, That if a woman, who hath Title of Dower, before that ſhe be endowed, will enter, and levie a Fine, that the ſame is within the ſaid Statute, and yet ſhe is not Tenant in Dower: See Dyer, 5 Ma. 140. Penycocks Caſe; and ſee now, 36 Eliz. Sir George Browns Caſe, adjudged accordingly.

Trin.

Trin. 29 *Eliz.* In the Common Pleas.

CCVII. Morris *and* Webbers *Caſe.*

IN an Ejectione firmæ, by Georg Morris againſt Webber, alias Turnor, the Plaintiff declared upon a Leaſe by Humphrey Bury, &c. And upon Not guilty, the Jury found this ſpeciall matter: That Hen. Bury was ſeiſed, Et cepit in uxorem quandam Willmottam Gifford. 4 Mariæ, And afterwards: 1 Eliz. ſhe Libelled in the Spirituall Court againſt the ſaid Henry, in cauſa divortii de nullitate matrimonii; and found upon the Libel, In hæc verba, and all the ſentence upon it; viz. In Dei Nomine, Amen. Per depoſitiones & examinationes Medicorum, & aliorum fide dignorum, & honoſtarum, & expertarum matronarum comperimus & invenimus: Quod prædict. Henr. & Willmotta legit. ætatis & plenæ pubert. exiſt. per duos annos integros ſimul cohabitaverunt, & in uno lecto concubuerunt, & licet dict. Willmotta operam liberis dare cupierit, nunquam tamen per carnalem copulam cum dicto Henrico conjungi, aut ab illo cognoſci potuit, aut poteſt, idque propter vitium perpetuæ frigiditatis & naturæ impotentiæ generandi, Quæ nulla medicorum opera curari pot. idque prædict. Humphrid. ſæpius confeſſus eſt, ſe nunquam cum prædicta Willmotta tanquam virum cum uxore conjunctum fuiſſe, aut conjungi potuiſſe. Igitur invocato primitus Dei nomine, Matrimoniam prædict. irritari, ceſſari, quatenuſcunque de facto proceſſit, caſſum, irritum, nullumque in Lege, Juribus juris omnino carere, & carere debere decernimus, & declaramus, ipſoſque quatenus ſunt de facto matrimonialiter ad invicem conjuncti a vinculo Matrimonii ſeparamus, &c. Humphrey made a Feoffment in Fee unto the uſe of himſelf for life, and after to the uſe of the firſt, or eldeſt ſon of the body of the ſaid Henry in tayl. Willmot married Carie, Henry took to wife, Phillippa Mountjoy ſcientem Matrimonii prædict. & definitivæ ſententiæ prædict. & durantibus ambobus Matrimoniis: tam inter dict. Carie & Willmotta, quam inter dictos Henricum & Philippam, dicta Philippa exitum habuit per dict. Henricum, Humphrey the Leſſor, upon which Leaſe the Plaintiff declared, Humphrey died: Henry entred, and leaſed to the Paintiff. Shuttleworth, Serjeant, argued for the Plaintiff, That this Divorce not reverſed or undone by appeal, or otherwiſe, ſhould ſtand in force, and according to it, the Law of the Land ſhould judge: See 47 E. 3. 17. Caſu ultimo. Five manner of Divorces are mentioned: 1 Cauſa profeſſionis: 2 Præcontractus: 3 Conſanguinitatis: 4 Affinitatis: 5 Frigiditatis; upon a Divorce, Cauſa profeſſionis, the wife ſhall be endowed, and the heir ſhall inherit, but in the other not. And the principall Cauſe is reported by the Lord Dyer, 2 Eliz. 179. where Carie and Willmott levying a Fine of the lands of Willmott, as husband and wife, and it was moved, That ſuch Fine ought not to be engroſſed, becauſed that now the Divorce is avoided; for Henry in his ſecond marriage hath iſſue, therefore there is no perpetua frigiditas, &c. but at the laſt it was engroſſed, becauſe the ſentence of the Divorce doth continue in its force, and then Humphrey, born in the ſecond marriage, is the firſt ſon of Henry lawfully begotten, and ſo capable of the uſe to him limited upon the Feoffment of Henry, 21 E. 4. Fitz. Conſultation, 51. by Catesby: where my father and mother are divorced without lawfull cauſe, and afterwards they marry themſelves elſewhere, and dye, the ſaid Divorce, as long as it is in force, ſhall binde me in point of inheritance, and I cannot have an Action as heir, &c. during the Divorce, is in for: For the Divorce being a ſpirituall Judgement ſhall not be reformed b in the ſpirituall Court; and therefore this ſentence of Divorce, Cauſa perpetuæ frigiditatis, as long as it is in force not repealed or reverſed, ſhall binde all

perſons: But in ſome caſes, ſuch a Divorce ſhall not diſable the party to ſue; as if a man bringeth an Action, De muliere abducta cum bonis viri, where after the treſpaſſe committed, the husband and wife are divorced, yet the Action lieth, for this Action is not in the right, but in poſſeſſion onely, and in ſuch Action, Never accounted in legall Matrimony, is not any plea, but the Defendant ought to anſwer to the poſſeſſion, Not his wife; for although they are divorced, yet the Action lieth: and Judgement is given in the ſpirituall Courts, the Courts of the King ſhall receive and admit of them, as long as they are in their force. The Abbot of Fountains Caſe, 9 H. 6 32. the cuſtom of the Abby was, That at every vacation of the Abbot, the Monks ſhould proceed to a new Election, and that he who ſhould be choſen by the greater number of the Monks, ſhould be Abbot: and the Caſe was, That upon ſuch avoidance, one A. was elected by the greater number of voices, (ſcil.) 22 Monks. And B. was choſen by the leſſer number, (ſcil.) 20 Monks; but notwithſtanding that, B. entred and carried himſelf as Abbot, by the Inſtitution of the Viſitor, and made a Deed by conſent of the Covent, and dyed; it was holden, That the ſaid Deed ſhould binde the Houſe: for here is a ſpirituall Act, (ſcil.) the Inſtitution of the Viſitor, which being in force, ſhall bind us, and our Law, 34 H. 6. 38. upon contention betwixt two Patrons, claiming the preſentment unto a Church, the Biſhop awarded, jure Patronatus, which found for one of them, upon which the Biſhop admited the Clerk of him for whom it was found by the jure Patronatus; and afterwards, the other party brought a Quare impedit, and it was found for him: Now this judiciall Act done by the Biſhop, ſhall excuſe the Biſhop from any diſturbance. Fenner, Serjeant, contrary. Although that the ſentence of this Divorce be ſet down in peremptory and finall terms, as matrimonium caſſum, irritum, nullum, yet our Law ſhall reſpect the cauſe and ground of it, (ſcil.) Perpetua frigiditas, &c. and now it appeareth by the ſucceſſe of the ſecond marriage, (ſcil.) the iſſue Humphrey, that the cauſe and matter upon which the Divorce was grounded, &c. was an offence of the time, and not of nature, for he is now recovered: and in as much as the Church hath erred in the ſentence of this divorce, which error is now apparent; this Court ſhall adjudge according to the truth of the matter, as the ſpirituall Law ought to have adjudged, and not as they have adjudged: And he cited Foxes Caſe, 16 Eliz. The ſaid Fox being Parſon of a Church, was deprived in the Parliament time for incontinency, and by the ſame Parliament, all incontinencies were pardoned; Now, upon the matter, we are to adjudge this deprivation meerly void without any other ſpirituall act. At another day, the Caſe was argued by Walmſley Serjeant, That the ſentence definitive of the ſpirituall Court, in cauſe of divorce, cauſa frigiditatis, ſhould ſtand; and he argued much in what manner the Law of the Church, and the Law of the Land ſhould determine marriage: and he argued that the right of marriage, was determinable by the ſpirituall Law; and he ſaid, that ſuch ſentences ought to be paſſed by our Law, and taken notice of; and therefore he who pleads a Divorce, ought to ſhew before what Judge the Divorce is had, to the intent the Judges may know to what perſons they ſhall write for the triall of it; and it appears in our books, That our Law takes upon it the Conuſance of the competency of an Eccleſiaſticall Judge; which ſee, 2 E. 4. 15 and 16. The Judges of the temporall Courts of the King, have determined, That the Pope is not a competent Judge within this Realm: and it is true, the Common Law doth yeild unto the Law of the Church the triall and determination of the right of marriage; but the triall of the poſſeſſion of the marriage retains to it ſelf: As if an Infant marrieth within the age of conſent, and afterwards at full age of conſent, doth diſagree, now the common Law ſhall determine that the ſame is not any marriage: So 11 H. 4. 167. The temporall

Court

Court ſhall adjudge upon marriage in fact and in poſſeſſion, but if the party will plead, That they were never accounted in lawfull matrimony, a Writ ſhall go unto the Biſhop to certifie the ſame; and in treſpaſſe, De muliere abducta cum bonis viri, and in Cui in vita, &c. this iſſue, Not his wife, is to be tried by the temporall Court of the King: for the right of the marriage is not in queſtion, but it is ſufficient, if it were a marriage in fact and in poſſeſſion: See 44 Aſſ. 12. & 13. and ſee 21 H. 7. 39. The temporall Court ſhall determine of the marriage, if void, or voidable: A Deacon marrieth a wife, that marriage is not void, ſo of a Prieſt; but if a man marrieth a Nun, the marriage is void: But in our Caſe, here is a ſentence definitive, in a cauſe of Divorce, in which caſe it doth not belong to us to examine the cauſe, but be the Divorce right or wrong, it ſhall ſtand, &c. 10 E 3. Bar. 296. Niſi ſit quoad thor. tantum, vel cauſa caſtitatis: And ſee by Shelley, 28 H. 8. 13. If they of the ſpirituall Court give Judgement in any cauſe, be it true or falſe, untill it be defeated or reverſed, it ſhall bind all the world: See 22 E. 4. Fitz. Conſultation 5. Corbets Caſe, 4 H. 7. 14. by Oxenbridge, 18 E. 4. 30. by Chock; and 9 E. 4. 24. He who pleads a Divorce, ought to ſhew before what Judge the Divorce was had; but that is not to examine the matter, but to know to what perſon the Court ſhall write for the triall of it. It is true, that in caſe of Reſignation and Deprivation, but in caſe of Divorce, the cauſe thereof ought to be ſhewed; for ſome divorces diſſolve the marriage utterly, and do baſtardize the iſſue, and diſable the wife to be endowed; and ſome divorces do not diſſolve it: as that which is but a thoro & menſa, 11 H. 7. 27. But generally, in ſpirituall Judgements, the cauſes of them do not fall in Judgement in any temporall Court: 3 H. 4. 34. An Excommengment pleaded without ſhewing of any cauſe; and although in our Caſe, the cauſe of this Divorce being for Frigiditie, Sublata jam cauſa tolleretur effectus; and now, the party in whom ſuch frigiditie is alligned, is become whole, as appeareth by his ſucceſs in his ſecond marriage, having now iſſue; yet we ought not to regard that, for then we ſhould reſort unto the cauſe of the Divorce, with which we are not to meddle. Gawdy Serjeant, to the contrary: And firſt he confeſſed, that the determination of the right of marriage doth belong unto the ſpirituall Court; But as unto the caſe in queſtion; (ſcil.) the Divorce in cauſu frigiditatis, it appeareth by 44 Aſſ. 13. by Kniver, That the party may receive his Nature, in which caſe he may have again his wife, and there need not in ſuch caſe a new marriage; And becauſe that here it appeareth, That Bury hath recovered his Nature for as much as he hath now iſſue by another wife, the Divorce is become of no force, which ſee Dyer 2 Eliz. 179. where the Caſe now at the Bar was in debate; Where a woman Inheretrix took a huſband from whom ſhe was divorced, Cauſa frigiditatis, the wife afterwards was married to Carie, by whom ſhe had iſſue, and gave all her Inheritance to her ſaid ſecond husband: and the firſt husband alſo took a wife of whom he had iſſue; in that caſe, the opinion of the Doctors was, That the firſt husband & his wife ſhould be compelled to cohabite together as man and wife, becauſe, Eccleſia decepta fuit in priore judicio. Anderſon, That which you have argued is very cleer; (ſcil.) That the Eccleſiaſtical Court hath authority to determine the right of marriage, But the point of this Caſe is, If this Judgement of Divorce being given for cauſe of Frigidity, which was adjudged to be perpetuall; and now, by matter ſubſequent, it appeareth, that the party is not frigidus, but he hath recovered his Nature, if the Divorce ſhall be accounted ipſo facto void, without other circumſtance of the ſpiritual Law: and although their ſentence be definitive in terms, yet, upon his ſpeciall matter, Ex poſt facto, if the force thereof ſhall fail. And I have conferred with many Learned in the Canon Law, which are of ſuch opinion; and of that opinion was Doctor Dale; and therefore it is convenient, that

your Clients, each of them, do retain one who is learned in the ſaid Law, who can inform us what their Law is. And Rhodes, Juſtice, agreed in this caſe to what the Lord Anderſon ſaid, and put the caſe which was in the Kings Bench, 16 Eliz. Foxes caſe, which is before vouched, and it was adjourned. And after, at another day, by the appointment of the Juſtices, the caſe was argued in Court by the Civilians and Canoniſts: Goldingham, on the part of the Plaintiff, and Steward on the part of the Defendant: And firſt it was ſaid on the Plaintiffs part, That by the ſentence, all the matter, tranſit in rem judicatam, and therefore we ſhall not reſort to the matter cenſured, the ſentence being in its force. And as to that, it was anſwered by Steward, That tranſit in rem judicatam, but in caſe of marriage, and in the like caſes, where vertitur periculum animæ; for in ſuch caſes the ſentences are ſubject to the ſucceſſe; as if after it appeareth, Eccleſiam fuiſſe deceptam per errorem licet probabilem (ut illi loquntur) for then periculum animæ vertitur, for then they ſhould continue their Adultery, unleſſe the ſentence of the Church be annulled. Goldingham, It tranſit in rem judicatam, non quoad inſtantiã, non quoad cauſam: ſo that as long as the ſentence is in force, it is cauſa judicata; yet the cauſe is ſubject to the cenſure of the Church. Steward, In our Caſe here, all our Books are, Matrimonium ſit nullum: Goldingham, The words are alſo in ſuch, reparabitur matrimonium, in which it is implied, that ſome ſolemnity of the holy Church is requiſite in ſuch reparation of marriage. Steward, Where a man is divorced, cauſa frigiditatis, it is prohibited by ſuch ſentence that he ſhall not marry again, and if he doth marry, he is holden in our Law perjured, and an Adulterer; and to that purpoſe he cited divers Authorities of the Canon Law. Goldingham, This ſentence is not properly a Divorce, for here was never properly a marriage: as in caſes, de præcontract. Divorce upon that cannot be ſaid properly a Divorce, but a ſentence of the Church upon the Error of the parties: and he put many degrees of impoſitions in ſuch caſes, Perpetua frigiditatas, & naturalis impotentia generandi; frigiditas ex malefacio: i. e. quoad unam aliquam perſonam', and many others', quæ poſſunt matrimonium contrah. & dirimere contractam: and the ſentences which in our Law, are contra jus conſtitutionis: as where there is not any Citation, Declaration, or that the ſentence is of another thing then that which is contained in the Libell, in ſuch caſes the ſentence is utterly void; but ſentences there given, contra jus partis, are voidable only; See Panormit. fraternitatis: Si notorie apparet ſententiam Divortii fuiſſe injuſtam, libet revocari, non obſtante quod non fuerit appellat. Sententia ceſſat cum notorie conſtat de injuſtitia: Et in Inſtitutionibus juris. Can. 189. Si vir cauſetur arctitudinem in muliere, per quam non eſt habilis ad coeundum, & ex eo ſeparatur, Si mulier poſtea aliquem invenierit qui ſeras reſerare poſſit, ad primum conjugium redire compellandi ſunt: vid. corpus Canon. 357. conjugium confirmatur officio, ſed poſtquam confirmatur officio non licet viro uxorem dimittere, nec uxori a viro diſcedere niſi cauſa fornicationis, verum antequam confirmatur impoſſibilitas officii ſolvit vinculum conjugii: And Panorm. fratern. propter Arctitudinem mulieris, ſi apparet quod præter divinum miraculum abſque periculo corporis habilis reddi non poſſit, ſeperentur: matrimonium tamen redintegrabitur ſi poſt appareat Eccleſiam fuiſſe deceptam: Per matronarum viſum datum fuit intelligi quod nunquam potuit eſſe mater, & eam ob cauſam divortium inter eos celebrat. fuit, mulier virum cepit, qui ſeras reſeravit, ſententiam divortii per errorem licet probabilem novimus eſſe prolatam, cum patet ex poſt facto quod ipſa cognoſcibilis erat illi cujus ſemel commiſcetur, & ideo inter ipſam & primum virum matrimonium extitiſſe, Quare inter eam & ſecundũ conjugem matrimonium non eſſe, *&c.* Eoſque præcipimus ab invicem ſeperari. Vid. ſecundam partem ſummæ ſilveſtrianæ. Si Eccleſia ſit decepta in hoc quod ille in quo erat impedimentum carnalem copulam cum alia perfecerit, redintigrabitur

præcedens

præcedens matrimonium, & dirimetur ſecundum, quamvis de ſententia Eccleſiæ factam. Et alibi: Si Eccleſia ſe deceptam invenierit ex hoc quod impedimentum quod judicavit perpetuum, apparet temporale, redintegrabitur primum matrimonium, *&c.* And afterwards the Caſe was adjorned.

Afterwards, that is ſay, Mich. 30. and 31 Eliz. the Caſe was moved again, and Judgement was prayed for the Plaintiff; and then the Lord Anderſon, Ex aſſenſu ſociorum, commanded that Judgement ſhould be entred for the Plaintiff; and ſhewed unto the Councell of both parties, That above the Certificate, which the four Doctors have ſhewed unto us, of their opinions upon the point, we our ſelves have conferred with the ſaid Doctors, who have given us their anſwers, That the ſaid ſentence of Divorce being yet in force, not reverſed is peremptory and not ſubject to the ſucceſſe: and although in the Examinations and Depoſitions taken in the Eccleſiaſticall Court, no matter appeareth, upon which, ſuch peremptory Divorce might be granted, yet it might be, as we are informed by the ſaid Doctors, That upon the Examinations of Phyſitians and Matrons, ſufficient matter did appear to the ſaid Eccleſiaſticall Judges, (which for modeſty ſake ought not to be entred of Record) and that appeareth within the ſentence; i. Habito ſermone cum matronis & medicis, which ſpeech not entred of Record (cauſa qua ſupra) might be the cauſe that induced the Eccleſiaſticall Judges to give ſentence for the Divorce, notwithſtanding that the matter within the Record be too generall to prove, naturalem frigiditatem generandi, but rather maleficium; and afterwards Judgement was given for the Plaintiff, and ſo the ſentence is bound by the Divorce, as long as the ſentence doth continue in force: See this Caſe in Coke, 5 Part. Where, upon a Writ of Error brought, 41 Eliz. the Judgment was affirmed.

Trin. 29 *Eliz.* In the Common pleas.

CCVIII. Gittinſon *and* Tyrrels *Caſe*.

GIttinſon brought an Action of Debt againſt Tyrrel, Warden of the Fleet, by a Bill of Priviledge, but he would not appear; and the Court was in great doubt, what remedy the Plaintiff hath to compell the Defendant to appear. For he cannot be forejudged the Court, becauſe he hath an Eſtate of Inheritance in the ſaid Office; And afterwards it was furmiſed to the Court, That the ſaid Tyrrel had made a Leaſe of his ſaid Office to another for three years, and then the Court was cleer of opinion, That the ſaid Tyrrel ſhould not have the Priviledge; for now, during the Leaſe, he is not Officer, but the Leſſee.

Trin. 29 *Eliz.* In the Common Pleas.

CCIX. Harris *and the Lord* Mountjoys *Caſe*.

HArris affirmed a plaint of Debt in the Guildhall in London, againſt the Lord Mountjoy, and made an Attachment of the goods of the ſaid Lord in the hands of Sir Drew Drewrie; The Lord removed the matter into the Common Pleas, by a Writ of Priviledge; If now the ſaid Lord ſhall finde bail was the queſtion, becauſe that he is a Lord of the Parliament, &c. And the opinion of the whole Court was, that he ſhould finde bail, for that is the courſe of the Court, whoſoever is party. And by Anderſon, admitting the Law to be, That the body of a Lord of Parliament ſhall not be taken in Execution (which I do not believe) yet notwith-

withſtanding that bail ſhall be found in ſuch caſe: For the condition of bail doth conſiſt upon two points: Firſt, that he render his body to priſon in Execution, if Judgement be given againſt him. Secondly, or to pay the condemnation: And therefore, if the body of the Baron of Parliament is not ſubject to Execution, yet the bail ſhall ſtand for the ſecond; i. e. to pay the condemnation; and all the Juſtices were of cleer opinion, That for execution upon a Statute-ſtaple; Merchant, upon the Statute of Acton Burnel, or upon the Statute of 23 H. 8. The body of a Baron of Parliament ſhall be taken in Execution; for by theſe Statutes, ſuch perſons were not exempted.

CCX. *Trin.* 29 *Eliz.* In the Common Pleas.

NOte, It was ſaid, That the diviſion of a great Meadow into many parcels, by making of Ditches, is not waſte; for the Meadow may be the better for it; and it is for the profit and eaſe of the occupiers of it: And by Windham and Rhodes, Juſtices, If a Termor converteth a Meadow into a Hop-garden, the ſame is not waſte, for it is imployed to a greater profit, and it may be Meadow again: Periam Juſtice, Although it be a greater profit, yet it is alſo with greater labour and charges; And the converſion of a Meadow into an Orchard is waſte, although it may be to the greater profit of the occupier.

CCXI. *Mich.* 39 & 30 *Eliz.* In the Common Pleas.

IN a Replevin, the Defendant avowed for damage feaſant, and upon iſſue joyned, it was found for the avowant, and damages aſſeſſed; and now iſſued a Retorno habendo, upon which the Sheriff did return, Averia elongata, whereupon a Withernam was awarded, and now came the Plaintiff and tendred in Court the damages aſſeſſed by the Jury, and prayed ſtay of the Withernam, and threw the moneys into Court; but the whole Court was cleer againſt it; for in this caſe the Plaintiff ought to pay a Fine, becauſe he had Eſloigned the Cattel which is a contempt; wherefore the Court aſſeſſed a Fine of three ſhillings four pence upon the Plaintiff, and then the Plaintiff had his prayer.

Paſch. 29 *Eliz.* In the Common Pleas.

CCXII. Shrewsbury *and the Inhabitants of the Hundred of* Aſhton

AN Action upon the Statute of Hue and Cry, was brought by Shrewsbury againſt the Inhabitants of the Hundred, of the three Hundreds de Aſhton in the County of Bucks: It was moved on the part of the Defendants, That if upon ſuch Hue and Cry the Inhabitants do their endevors, as much as in them is, to follow and take the Malefactors, and yet they cannot apprehend them, that in reaſon they ought not to be charged by the ſaid Statute. But the whole Court was ſtrongly againſt it: And by Anderſon, The Inhabitants of the Hundred, in which the Robbery was done, are bound to apprehend the Felons, or ſatisfie the party robbed. And the party robbed is not bound to give notice to the Inhabitants, nor to direct them which way the Felons took their flight, but the Inhabitants are bound to follow the Felons without any ſuch inſtruction. And after the Enqueſt

was

was taken, and gave a Verdict in this manner: That whereas the Plaintiff had declared, That the Robbery was done in the Parish of D. in the Hundred aforeſaid, the Jury found, that the place where the Robbery was done, is a Lane within the ſaid Hundred; and that the one ſide of the ſaid Lane is within the Parish of S. and the other ſide within the ſaid Parish of D. and that the Robbery was done in the ſide of the ſaid Lane, which was in the Parish of S. and prayed the opinion of the Court upon that matter. And the Court was cleer of opinion, That notwithſtanding that Exception, the Plaintiff ſhould have Judgement; for here is the right Hundred which ought to be charged; and the miſtaking of the Parish is not to any purpoſe. But then it was moved on the part of the Plaintiff; that for as much as the Verdict aforeſaid was ſpeciall, by reaſon of the doubt which the Jurors conceived upon the miſtaking of the Parish, in the Plaintiffs Declaration, That the charges of the Jurors ſhould be indifferently born by both parties, as the courſe is in caſes of ſpeciall Verdicts; but the whole Court was cleer againſt that, and commanded that the Plaintiff alone ſhould pay the ſaid charges, for the matter here found ſpecially is not any doubt; but out of all queſtion, for it is cleer that the action is well brought, for as much as the Hundred is charged, the miſtaking of the Parish ſhall not hurt.

Trin. 29 *Eliz.* In the Common Pleas.

CCXIII. Hellyards *Caſe.*

A Habeas Corpus was to the Warden of the Fleet, to bring the body of one Hellyard, who returned the Writ, That the ſaid Hellyard was committed to the Fleet, Per mandatum Franciſci Walkingham, Militis unius principalium Secretariorum Dominæ Reginæ, &c. And becauſe the Warden did not ſhew in his Return for what cauſe the ſaid Hellyard was committed, the Court gave him day to amend his Return, or otherwiſe the priſoner ſhould be delivered.

CCXIV. *Mich.* 30 *Eliz.* In the Common Pleas.

UPon a Recovery in a Writ of Entrie, Sur diſſeiſin of two acres of land, Habere facias ſeiſinam was awarded. The Sheriff as to one acre returned Habere feci; as to the other tarde. And the Return was ſhewed to the Court; and all the Juſtices but Periam held, that the Sheriff ſhould be amerced for that Return, contrary and repugnant in it ſelf; But by Periam, it may be, That the acre of which no ſeiſin is had, was ſo far diſtant from the other acre, whereof ſeiſin was, that the Sheriff, for want of time, could not make execution of both, being ſo remote the one from the other. To which it was anſwered, That if the truth of the Caſe was ſuch, then might the Sheriff make execution in one acre in the name of both acres. And if upon a Capias ad ſatisfaciend. againſt two, the Sheriff both return as to one, Cepi, and to the other tarde, he ſhall be amerced, for thoſe ſeverall Returns cannot ſtand together.

Mich. 30 *Eliz.* In the Common Pleas.

CCXV. Edgar *and* Criſpes *Caſe.*

EEgar recovered againſt Criſpe in Debt, and afterwards releaſed to Criſpe, and afterwards, notwithſtanding the releaſe, Edgar ſued for a

Capias

Capias ad ſatisfaciend. againſt Criſpe, and purſued the ſame untill Criſpe was outlawed: And it was the opinion of Anderſon, chief Juſtice, That Criſpe ſhould have an Audita Querela, notwithſtanding the Outlawry; and if the Audita Querela paſſeth with Criſpe, the Outlawry alſo ſhould be avoided.

Trin. 30 *Eliz.* In the Kings Beneh.

CCXVI. Frankwells *Caſe.*

IN Treſpaſſe for carrying away of Tythes, the Caſe was; That Frankwell, Parſon of the Church of D. was accuſed, in forma Juris, before the high Commiſſioners, who pleaded, that the ſame cauſe and crime was proſecuted againſt him in the Arches, and prayed that he might not be doubly vexed for one and the ſame offence; and notwithſtanding that he was deprived, and another Clerk preſented to the ſame Church by the Patron, and was admitted, inſtituted and inducted; and upon entry, brought Treſpaſſe againſt the former Incumbent. And note, the manner of the Deprivation, as it was found by Verdict: That the Biſhop of London, with the aſſent of the other Commiſſioners, gave ſentence of Deprivation againſt him; and it was ſhewed, That the high Commiſſioners had not power by 1 Eliz. to give ſentence of any thing which is dependant in another Court: For it was not the intent of the ſaid Act, to take away the juriſdiction of the other Eccleſiaſticall Courts; for then it is in vain to have ſuch Courts: It was alſo moved, becauſe the pleading is, That the Biſhop of London, ex aſſenſu of the other Commiſſioners, gave ſentence, the ſame is a void ſentence; for it ought to be the ſentence of all the Commiſſioners, for they all have equall authority: And to this purpoſe, he cited the Caſe, 29 H. 8. Dyer 40. where a Leaſe is made of Lands, whereof the Dean and Chapter are ſeiſed, in common, per nomen Decani ex aſſenſu, & conſenſu totius Capitul. but is was holden a void Leaſe; for the Chapter ought to be party to ſuch Leaſe; contrary, where the Leaſe is made of the Land which is the proper and peculiar Inheritance of the Dean: But that Exception was not allowed; for the form of Entries in all caſes, hath always been ſo. Coke, poſito, That the Commiſſioners ought not to proceed in this Caſe, yet, becauſe they have ſo done, the ſame ought not to be examined here; for the Judges here, ought to think that this Deprivation was duly made; for, cuique credend. in ſua arte, which Wray granted: And it was ſaid by him, That the Court was created for two cauſes: 1 For the expedition of the cauſes depending in the ſpiritnall Courts: 2 To give to ſuch Judges authority to puniſh offences in more high degrees; for before they could not but onely excommunicate, but now they may impriſon; and if the party had Libelled againſt him in the ſpirituall Court of the Arches, it is no reaſon but that the party for his own expedition, and for to procure due puniſhment againſt the offender, may ſend the cauſe into the moſt high Court; and after Judgement was given according to the Deprivation: And afterwards Error was brought thereupon, and the Error aſſigned upon the matter in Law, whether the ſaid Deprivation was lawfull or not? Coke, I remember the reaſon of the Judgement given by the Court was, That admitting that the ſentence of the high Commiſſioners was erronious; yet it ſhall binde untill it be reverſed by appeal. Fenner, If the party grieved might be reſtored by appeal, I agree, that ſuch ſentence ſhould binde untill it were reverſed; but in our Caſe, no appeal lieth from the high Commiſſioners, wherefore we ought to be helped here; or otherwiſe we are without remedy: Coke, If the Delegates give ſentence, no appeal lyeth, and yet the party grieved ſhall

not

not be helped here: Fenner, 16 Eliz. One Foxe was deprived the laſt day of the Parliament for incontinency, which offence was pardoned by the ſame Parliament, and that ſentence of Deprivation was holden void. Anderſon, In your Caſe, the offence it ſelf was pardoned and diſcharged: Alſo it is againſt a generall Statute, of which every one ought to take notice. Periam, When the Caſe was in the Common Pleas, it was moved; If of a ſentence given by the high Commiſſioners, an Appeal did lie; and it was certified by Clark, Doctor of the civill Law, that it did; for the Commiſſioners are as the Delegates of the Queen: And as by the Canon Law one might appeal from the Delegates of the Pope, unto the perſon of the Pope; ſo now, one may appeal from the high Comiſſioners, to the perſon of the Queen: See for that, 24 H. 8. 12. Another Error was aſſigned, becauſe that the Commiſſion gave authority to the Commiſſioners, to adjudge upon confeſſion of the party, or upon the witneſſes; but here none of theſe two ways is found by the Verdict; but ſentence was given upon his Plea, That he was ſued in the Arches for the ſame cauſe, and ſo they have not purſued their authority: for the Act is, That ſuch Commiſſioners ſhall have authority by vertue of the ſaid Act, and of the ſaid Letters Patents to exerciſe, &c. And they are directed by the Letters Patents, that they ſhall proceed upon due proof had by confeſſion or true witneſſe, to give ſentence. Periam, Although they have not obſerved the due form preſcribed unto them by the Letters Patens; yet ſuch ſentence is not void. Anderſon, If the party appeareth and will not anſwer, it ſhall be taken pro confeſſo, and he ſhall be condemned.

Trin. 38 *Eliz.* In the Common Pleas.

CCXVII. *Sir* John Sands *and* Packſal Brocas *Caſe.*

SIr John Sands brought an Action upon the Caſe againſt Packſal Brocas, upon a Trover of goods and houſhold-ſtuff; The Defendant pleaded as to parcell, that they were fixed to his Freehold in S. in Hampſhire, Abſque hoc, that he found them in other manner; as to other part, that the Plaintiff gave them to him at D. in Hampſhire, and as to the other part, he pleaded, Not guilty: For the firſt part, the Plaintiff cauſed it to be entred, Non vult ulterius proſequi, and took iſſue upon the two other; and it was found for the Plaintiff by ſeverall Juries, in ſeverall Counties, and damages and coſts aſſeſſed by the Juries: and now the Defendant brought Error, and aſſigned Error, i. becauſe the Plaintiff as to the firſt had entred, Non vult ulterius proſequi, which is a Non-ſuit, and Non-ſuit in part, is Non-ſuit in all. Anderſon, It is a Queſtion, if this be a Non-ſuit? The entry is, Querens venit, & gratis conceſſit, that as to the goods mentioned in the firſt Plea, Non vult ulterius proſequi, Ideo, conſideratum eſt quod nihil de iiſdem verſus The Defendant, fiat, eſt ille & pleg. in miſeric: & the Defendant, eat inde ſine die. Periam, A Non ſuit is, when the Plaintiff is demanded and doth not appear; but when he comes into Court, and ſaith, Quod non vult ulterius proſequi, the ſame is a Retraxit: Nelſon, Preignothorie, Non-ſuit is upon default; but here, the Plaintiff appears, and this is the uſuall form of entry of a Retraxit. Another Error was aſſigned, becauſe both Juries have aſſeſſed coſts, and Judgement given according; whereas the laſt Verdict ought to do it. And where two Juries are to try the iſſue, the form of entrie after the firſt Verdict is, Ceſſat executio, untill the other iſſue be tried: Vid. 21 H. 6. 51. 36 H. 6. 13. Anderſon, Severall iſſues cannot ſever the coſts, although they may the damages, for it is but one ſuit; therefore but one coſts, and that is the reaſon that Judgement ſhall not be given

untill the laſt iſſue be tried, becauſe that coſts ſhall be but once aſſeſſed, which was granted by the whole Court: And by Periam, The firſt Jury may aſſeſſe coſts for the whole ſuit, Quod fuit conceſſum. Coke, Here are ſeverall Judgements for theſe coſts; and although it be void for the later iſſue, yet it is good for the firſt. Periam, How ſhall it appear unto us which Verdict was the firſt, and which the laſt? although that the one Verdict be entred of Record before the other, the ſame doth not make that it was firſt given; wherefore, the whole ſhall be reverſed.

CCXVIII. *Mich.* 31 *Eliz.* In the Common Pleas.

A Man, 30 Eliz. made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of his firſt ſon, and his heirs; The father and the Feoffees before iſſue, for money, by Deed, give, grant, and enfeoff J. S. and his heirs, who hath not notice of the uſe; The Tenant for life hath iſſue, and dieth, the iſſue entreth: Glanvile, The uſe limited to the firſt ſon is deſtroyed; for without regreſſe of the Feoffees, it cannot riſe; and the ſame is gone by their Livery: See Plowdens Com. 340. And alſo he vouched the Caſe of the Earl of Kent, where by the releaſe of the ſurviving Feoffee, a ſleeping uſe was deſtroyed, and could not afterwards be revived. Harris, The uſe may riſe without entry of the Feoffees: And he put a difference between uſes created before the Statute and uſes created after; for in the firſt caſe, they ought to enter; and if they be diſabled by any Act: as in the caſe betwixt Gaſcoign and the Earl of Kent, they ſhall never riſe, but in the later caſe, all the authority and confidence is by the Statute out of the Feoffees, and the uſes contingent ſhall riſe without aid of the Feoffees by the operation of the Law; for the land is bound to the uſes, and charged with them: As upon a Recovery in a Warrantia Charta, the land of the Defendant is charged, pro loco & tempore; and according to the common experience in Conveyances for the payment of the Debts of the King: as in the caſe betwixt Breden and Dennis. The Debtor of the King makes a Feoffment in Fee to the uſe of himſelf and his heirs, untill he makes default of payment of ſuch a ſumme unto the King at ſuch a day, and upon default, to the uſe of the King and his heirs. Cooper, There needs no entry of the Feoffees, and he put the difference put before Harris, betwixt an uſe created before and a uſe created after the Statute: And now the Feoffees have not any power to revive or deſtroy ſuch uſes, but are only as inſtruments to convey the uſes; for the uſe is created upon the Livery, and is transferred by the Statute, if the perſon to whom the uſe is limited be capable thereof at the time of the limitation thereof; but if not, the Law ſhall preſerve the ſame, and it cannot by any means be prevented. And he put the caſe of Bro. Feoff. to Uſes, 50. 30 H. 8. And there is a great difference betwixt an Uſe limited before the Statute and after the Statute; for now, after the Statute, the Feoffees have not any ſeiſin, whereof they may make a Feoffment: And he put the caſe between Cheney and Oxenbridge; Cheney leaſed to Oxenbridge for 60 years, and afterwards enfeoffed Oxenbridge to the uſe of the ſaid Cheney and his wife for their lives, with divers remainders over; and it was adjudged in the Court of Wards, that by that Feoffment the term was not extinct: And he put the caſe of the Lord Paget in the Kings Bench adjudged. A Feoffment was made unto the uſe of the Feoffor for life, the remainder to him whom the Feoffor ſhould name at his death, in Fee; the Feoffor and the Feoffees for good conſideration, levied a Fine unto a ſtranger, and afterwards the Feoffor named one and dyed, the party named by the Feoffor ſhall have the land, notwithſtanding the Fine. Beamount, The contingent uſe here, is utterly deſtroyed by the Feoffment

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aforeſaid; and it appeareth by the preamble of the Act of 27 H. 8. That the makers of the Act did not favor Uſes, but their intent was utterly to extirpate Uſes: And if contingent uſes which are not, nor cannot be excuſed by the Statute ſhould ſtand in force, The miſchife would be, That no purchaſor ſhould be ſecured and ſafe in his purchaſe, but ſhould always be in danger of a new born uſe, not known before; and he grounded his further argument upon the reaſon of Manwood and Dyer, Where a man makes a Feoffment in Fee to the uſe of himſelf and his wife which ſhall be, and afterwards he and the Feoffees, and thoſe in remainder, make a Feoffment to divers new Feoffees, and to new Uſes; and afterwards he takes another wife, and dieth: It was the opinion of the ſaid two Judges, That by that Feoffment, Ut ſupra, the contingent Uſes are deſtroyed: For when the Eſtate which the Feoffees accept is taken away, which was the root and foundation of the Uſes which are the branches and fruit of the body of the ſaid Tree, it neceſſarily followeth, That they be alſo taken away; and becauſe the Feoffees by their Livery, are barred to enter to recontinue the Eſtate which ſhould yeild ſuch uſes, they alſo are gone and extinguiſhed. Yelverton, was of opinion, that notwithſtanding the ſaid Feoffment, that the Uſe ſhould riſe in his due time according to the limitation of it. It was adjorned.

Trin. 30 *Eliz.* In the Kings Bench.

CCXIX. *The Lord* Norths *Caſe.*

The Queen Granted unto the Lord North and his heirs, the Fines, pro licentia concordandi, and one would not pay him the Fine; for which cauſe, the Lord North brought an Action upon the Caſe againſt him, and declared upon In debitat. aſſumpſit, *&c.* Godfrey, moved this matter to the Court, to know their opinion, if ſuch Action would lie for the matter or not. Fenner, For a Fine in a Court-Baron, or Court-Leet, debt lieth; but as he conceived, here this Action doth not lie, for it is a reall Fine, and there is no contract betwixt the parties; but the ſame is given by the Law: and ſome were of opinion, That debt lyeth for a relief; for there is a contract by Fealty. Gawdy conceived, That the Action doth well lie; for it is not any caſuall profit, and therefore debt lieth for it, although it be an inheritance: And ſee Dyer 28 H. 8. 24. The heir ſhall have an Action of Debt upon a Nomine pœnæ reſerved by his Anceſtor: Wray, I do not ſee that he hath any other remedy, and therefore I am of opinion that this Action will lie.

Trin. 31 *Eliz.* In the Exchequer.

CCXX. *Mrs.* Paſchalls *Caſe.*

Mrs. Paſchall was bound with ſureties, for her appearance before the high Commiſſioners, that ſhe ſhould not depart without licenſe under the hands of three of them; and ſhe pleaded the generall Pardon at the laſt Parliament, in which there is an Exception of all Bonds and Recognizances, except onely ſuch Bonds and Recognizances as are for appearance: And Atkinſon argued, That ſhe ought to be diſcharged, by the Exception; for although the departure without licenſe be not ſpecially named, yet it is within the ſence; for the not departure without licenſe, is no other thing, then to continue her appearance. Popham contrary: For, The Non departure without licenſe, was ſet down in the Condition to this purpoſe, That ſhe ſhould not go into the Countrey to be

corrupted there, or to corrupt other, and receive Semynaries, &c. therefore it is another thing then appearance: Between Hore and Hare, the Caſe was, One was bound to make his appearance at ſuch a day, and in the mean time thrice every Monty to repair unto ſuch a Preacher to be better informed in Religion, although the Non appearance was pardoned; yet the other point, i. the reſorting to the Preacher, is to be anſwered. Atkinſon, There the reſorting to the Preacher is collaterall, and a ſeverall point from the appearance: But in the Caſe at Bar, the Not departure is purſuant to the appearance. And the opinion of all the Barons was, That the Pardon did not extend to the ſame.

CCXXI. *Trin.* 31 *Eliz.* In the Common Pleas.

AN Action was brought againſt an Executor, who pleaded, That he refuſed the Executorſhip, upon which the parties were at iſſue. The Biſhop certified, Quod non recuſavit, whereas, in truth, he had refuſed before the Commiſſary of the Biſhop. Fenner Serjeant, Moved to have the advice of the Court upon this matter, and argued, That the Court ought to write to the Commiſſary, which was denied by the Court; for he is not the Officer to this Court as to that purpoſe, but the Biſhop himſelf is our Officer: and the party cannot have an Averment againſt the Certificate of the Biſhop, no more then againſt the Return of the Sheriff: And the Court alſo held, That the only remedy for the Defendant, was by an Action upon the Caſe againſt the Biſhop for his falſe Certificate: But it was moved, That the iſſue joyned upon the refuſall, ought to be tried by the Country, and not by the Certificate of the Biſhop; and ſuch was the opinion of Windham and Walmeſley: Periam, Where the iſſue is, that the Executor refuſed before ſuch a day, or after, there the iſſue ſhall be tried by the Country; contrary, Where the iſſue is upon the refuſall generally, for the refuſall is before him as Judge, as alſo reſignation is.

Mich. 28 & 29 *Eliz.* In the Kings Bench.

CCXXII. Giles *Caſe.*

A Writ of Error was brought in the Kings Bench, to reverſe a Judgement given in an Action upon the Caſe, in the Court of Common Pleas; Where the Writ brought againſt the Defendant there in that caſe, was, Quare exaltavit ſtagnum per quod pratum of the Plaintiff was inundatum: The Defendant in the Action there pleaded, Not guilty, and the Jury found, That the Defendant, Erexit ſtagnum; and they ſaid, That if the Court ſhall judge, That Erectio and Exaltatio be all one, then they finde, that the Defendant is guilty; and afterwards Judgement was given in the ſaid Court of Common Pleas for the Plaintiff: Whereupon this Writ of Error is brought. And Glanvile, Serjeant, Who argued for the Plaintiff, in the Writ of Error alledged, The generall Error; viz. That Judgement was given for the Plaintiff, where it ought to be found for the Defendant: And he ſaid, That Erigere ſtagnum eſt de novo facere, exaltare, is erectum majoris altitudinis facere, De exaltare eſt ad priſtinam altitudinem adducere: Proſternare ſtagnum, eſt penitus tollere: And in every Action upon the Caſe, ſuch apt and preciſe words are to be in the Writ, according as his Caſe requires, unto the end that Judgement may in ſuch Action be given to the Plaintiff according to his plaint, and his damages, In 7 E. 3. 56. In Aſſiſe of Nuſans, Quare exaltavit ſtagnum ad nocumentum liberi tenementi ſui:

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The Defendant pleaded, that he had not inhaunced it after it was levied, and there it was ſaid by Drew, Serjeant, That there is not any other Writ in the Chancery, but Quare exaltavit ſtagnum. But that was denied by Herle: For that he ſaid that the Plaintiff might have a Writ out of the Chancery, Quare levavit ſtagnum: and there by that book it is aſſigned, That Levare ſtagnum, & exaltare ſtagnum do differ: and therefore he ſaid, that in this caſe, the Writ ſhould abate for the uſing of one word for another, 8 E. 3. 21. Fitz. Nuſans 5. by Chauntrel, In a Writ of Nuſans, Quare levavit, if it be found that he levied it to the Nuſans, &c. the whole ſhall be deſtroyed; but in a Writ Quare exaltavit, nothing ſhall be pulled down, if it be found for the Plaintiff, but that which is enhaunced onely: So 8 Aſſ. 9. Br. Nuſans 17. the ſame Caſe is put. And ſee 16 E. 3. Fitz. Nuſans, 11. If the Nuſans be found in any other form then the plaintiff hath declared, he ſhall not recover: And in 48 E. 3. 27. the Writ was, Quare divertit curſum aquæ, &c. and the Plaintiff ſhewed, that the Defendant had ſet pyles, and ſuch other things in the water, by reaſon whereof the courſe of the water was ſtraitened; and becauſe the Plaintiff might have had a Writ, Quare coarctavit curſum aquæ, the Writ was abated: Another Exception was taken, viz. That the Aſſiſe of Nuſans ought to be brought againſt the Tenant of the Freehold, and therefore it would not lie in this caſe; it not being ſhewed that the Defendant was Tenant of the ſoil: Vid. 33 H. 6. 26. by Moile, If a way be ſtraitned and impaired, an Action upon the Caſe lyeth; but if it be altogether ſtopped up, then an Aſſiſe muſt be brought; But there it is ſaid by Priſot, That if the ſtopping up of the way be done by the Tenant of the land, then an Aſſiſe lieth; if by a ſtranger, then an Action upon the Caſe: But for common Nuſances no action lieth, but they ought to be preſented in the Court Leet or Turn, and there redreſſed: and ſuch was the opinion of the whole Court in this Caſe. Then it was moved, That one of the Plaintiffs in the Writ of Error had releaſed; and the Queſtion was, whether that releaſe ſhould bar his companion? to which nothing was ſaid: At another day, the caſe was moved again, and Drew, Serjeant, ſaid, That Exaltare and Erigere, are all one; but all the Juſtices were againſt that; for that Erigere is de novo facere, and Exaltare is, In majorem altitudinem attollere, and afterwards Judgement was affirmed.

Trin. 30 *Eliz.* In the Kings Bench.

CCXXIII. Freeman *and* Drews *Caſe.*

IN an Action upon the Caſe by Freeman againſt Drew, The Defendant pleaded, That after the Aſſumpſit whereof the Plaintiff hath declared, There was an agreement betwixt them, That the Defendant, and two others ſhould be bound in a Bond to the Plaintiff for the ſum promiſed; and that they entred Bond accordingly: The Plaintiff confeſſed the agreement, and that the Bond was made according to the agreement, and that the parties bound, did deliver the ſame as their Deed, cuidem ignoto, to the Plaintiff; The Defendant ſaid, That they did deliver the Deed to one J. S. and gave notice thereof unto the ſervant of the Plaintiff, and that they are now ready to deliver it to the Plaintiff, upon which there was a Demurrer: Godfrey argued, That the ſaid Plea of the agreement ſpecially executed, Ut ſupra, was good, as in a Caſe lately adjudged between Alford and Leigh, Tr. 29 Eliz. Where the Arbitrament was made, That Leigh ſhould releaſe unto Alford before the Feaſt Petri ad vincula, and before the ſaid Feaſt, Leigh ſealed and delivered ſuch a releaſe unto the uſe of the ſaid Alford, and after the Feaſt, he tendered it to Alford, but he refuſed it, [illegible] brought

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debt upon the Bond for performance of the Arbitrament; and it was adjudged, That the Action would not lie; for if he do recover upon that Action, he alſo ſhould take advantage of the releaſe: Coke, in Alfords Caſe, A tender was to the Plaintiff himſelf, which is not in this Caſe; and although that it was after the Feaſt, yet it was before the ſuit commenced: and alſo in our Caſe the tender is depending the ſuit. Gawdy, If the Plaintiff ſhould recover in this Action, he might plead the recovery in Bar of the ſuit upon the Obligation. Wray, Let the Plaintiff releaſe the Bond, and take Judgement here, which was done accordingly.

32 *Eliz.* In the Common pleas.

CCXXIV. Somers *and Sir* Rich. Buckleys *Caſe.*

IN the Caſe betwixt Somers and Sir Richard Buckley; Where the Plaintiff prayed a Prohibition to the Court of Admiralty; The caſe was, That the Defendant ſued in the Admirall Court for the moyetie of a ſhip, and prize taken by them upon Letters of Repriſall; for the Civil Law is, That if two Ships meet at Sea together, although they do not go forth as conſorts, and the one Ship in the preſence of the other taketh a Ship with goods in it, the other Ship which was preſent ſhall have the moyetie, or one half of the Ship and goods taken; for although it did not take the Ship, yet the preſence thereof there at the time of the taking, was a terror to the other Ship which was taken, Sine quo, the ſaid Ship could not be ſo eaſily taken: And now the Plaintiff for the Prohibition did ſurmiſe, That after they were arrived in England, they did agree amongſt themſelves, That the Plaintiff ſhould have four parts of the ſaid Ship and goods ſo taken and the other five parts: And the Plaintiff ſaid, that he had pleaded this matter in the Court of Admiralty, and they would not allow the Plea, and thereupon he prayed a Prohibition, which was granted; but afterwards it was moved on the other ſide, That the ſaid Court of Admiralty would allow the Plea, and there try it; and thereupon a conditionall Conſultation was granted by the Court; ſo that if that Court allow that Plea, and try it there: And it was ſaid, If the Court there ſhould not allow the Plea, that they ſhould encurre the offence of contempt of this Court, and the other party ſhould have a Prohibition.

Mich. 32 *Eliz.* In the Kings Bench.

CGXXV. *Sir* Richard Buckleys *Caſe.*

SIr Richard Buckley was indicted upon the Statute of Præmunire of 13 and 15 R. 2. and the effect was, That whereas one Griffeth Matthew had murdered one Robert Footman at Beaumarris; and whereas one Owen Wood proſecuted the ſaid Griffeth Matthew for the ſaid murder; The ſaid Griffeth Matthew, Præmiſſorum non ignarus, ſed intendens, the ſaid murder, a Curia Dominæ Reginæ ad aliud examen, &c. pro quodam ſuppoſito contemptu Curiæ admiralitatis traxit in plitum: the ſaid Owen Wood, coram Julio Cæſar. in the Court of Admiralty holden at Iſlington; ſuppoſing the ſaid murder to be done upon the high ſea, and thereupon cauſed him to be arreſted, and being under arreſt, to enter Bond unto the Lord Admirall that he ſhould not proſecute the ſaid murder againſt the ſaid Griffeth Matthew, nor examine any witneſſes concerning the ſaid murder, and that the ſaid Sir Richard Buckley was abettor and procurator

of

of the ſaid Griff Mathew therein. To this Indictment many Exceptions were taken by Coke: 1 In placitum pro quodam contemptu, and doth not ſhew the contempt in certain; for it is too generall, and ſo not good: See 18 Aſſ. for the ſtealing of certain Sheep, without ſhewing what Sheep they were, is not a good Indictment. And here he doth not ſay; concerning the ſaid murder, or concerning the præmiſſes: 2 Although that the matter of the Indictment be true; yet the Stat. of Præmunire doth not extend to it, for the Statute inflicts a puniſhment as well upon the Judge, (ſcil.) the Admirall, as upon the party: See 10 H. 4. 164. If one Libelleth in the Court of Admiralty for a thing done upon the Land, and it appeareth upon the Libell, that the thing was done upon the Land, and they, notwithſtanding, that hold Plea of it; A Præmunire lieth upon it. But if the ſame doth not appear within the Libel, then it is not within the Statute, but a Prohibition ſhall only iſſue: So in the caſe of Tythes; If the Parſon ſueth for Tythes ſevered from the nine parts, and that appeareth in the Libel, the ſame ſuit is within the Statute of Præmunire; and that was Cardinall Woolſeys Caſe: 3 It is alledged, That Sir Richard Buckley procured him to do it, but it is not ſhewed any place where the procurement was had: And that was reſolved in the Caſe of the Lord Paget, and the Biſhop of Coventrey and Lichfield: where the Biſhop was indicted, That he commanded J. S. to enter into the Cloſe of the Lord Paget, and to do a treſpaſſe there, and becauſe the place of the commandment was not ſet forth in the Indictment, the Biſhop was diſcharged. M. 25 and 26 Eliz. Another matter was objected, becauſe that the words are, That the ſaid Sir Richard Buckley did abet and procure, in hac parte; without ſhewing what thing. As to this laſt Objection, The Court was of opinion, that the words (in hac parte) did referre to the whole offence contained in the Indictment: Wray, It is hard, That the matter of the Indictment ſhould be within the Statute of Præmunire; for by the ſuit it is ſuppoſed, That the offence was done upon the ſea; and the Admirall hath juriſdiction to puniſh murders committed upon the ſea, ſo in ſome degree the Admirall hath Conuſance to enquire of Murder; but if they hold plea of any thing of which in no degree they have Conuſance, it is otherwiſe. And as to the place where the commandment was made, the Court was cleer of opinion, that it ought to be ſhewed.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXVI. Hoopers *Caſe.*

Cro. Eliz 198. S. C

JOhn Hooper, alias Bartholomew, of D. &c. was Indicted upon the Statute of 8 H. 6. Of forcible Entry, and Exception was taken to the Indictment in default of addition of the place, &c. For the addition is here after the alias dict. and ſo there is no addition; and therefore the party was diſcharged: And it was holden in this Caſe, That Uxor is a good addition; and where the husband and wife are indicted, and the husband be indicted of ſuch a place, although the wife hath no addition of place, yet the ſame is good enough; but Ive ſaid, That in that caſe there needs not any place.

CCXXVII. *Mich.* 32 *Eliz.* In the Kings Bench.

A. WAs Indicted for not repairing of a Bridge lying in ſuch a high-way, which A. is bound to repair by reaſon of his land adjoyning; and the Indictment was, That the Bridge was ſo ruinous [illegible]ta quod Ligei Dominæ Reginæ per eam tranſire non poſſunt, and concluded [illegible]d nocumentum

tum eorund. &c. and that was challenged, becauſe it doth not ſay, Ad nocumentum omnium ſubditorum: for otherwiſe it may be intended a private way, of which party cannot be indicted, but the party grieved ſhall have his Action upon the Caſe: But the Exception was not allowed, but the Indictment is good enough; For the words of the Indictment are, Sic quod Ligei Dominæ Reginæ illuc pertranſire non poſſunt; i. e. all the Liege people and Subjects of the Queen; and then, ad nocument. eorund. amounts to as much as, ad commune nocumentum, &c. and for that cauſe, the Indictment was holden good enough.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXVIII. Aſhpernons *Caſe.*

ONe Aſhpernon was Indicted at the Seſſions, in the County of Suſſex, for an unlawfull aſſembly and entry into the Cloſe of one A. called, The Parſonage land, before two Juſtices of Peace there, and exception was taken to it, becauſe it is not ſet down in the Indictment, that one of the Juſtices was of the Quorum, but that Exception was diſallowed; for the Indictment is ſufficient, if none of them be of the Quorum, for they may enquire, but not determine: Another exception was, becauſe the contents of the Cloſe is not ſet down in the Indictment; (ſcil.) the number of the acres, nor if it be arrable, paſture, or Meadow; but that was diſallowed alſo; for this is but an Indictment of treſpaſſe, contrary, it is upon an Indictment upon the Statute of 8 H. 6. for there the party grieved is to have reſtitution, but ſo he is not here: Another exception was taken, becauſe that in the Indictment no time is ſet down when the treſpaſſe was done, but onely of the aſſembly, but that was diſallowed alſo; for both ſhall be taken to be done together all at one time.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXIX. Leveret *and* Townſends *Caſe.*

IN an Action upon the Caſe, for diſturbing him of his common; The Plaintiff declared, That he was ſeiſed in Fee of a Meſſuage and certain land, and that he, and all thoſe whoſe Eſtate, &c. have common of paſture in 16 acres of land called D. from the time that the corn was reaped, untill it be ſowed again; and alſo common of paſture in lands, called R. omni tempore anni, as appendant to the ſaid Meſſuage and land: and that the Defendant had plowed the ſaid lands, and ſo diſturbed him of his common, and found for the Plaintiff, and it was moved in ſtay of Judgement, That here it appeareth, that the Plaintiff was ſeiſed in Fee, and ſo he ought to have an Aſſize, and not an action upon the Caſe; but the exception was diſallowed per Curiam, See 2 H. 4. 11. 8 Eliz. Dyer, 250. 11 H. 2. Action upon the Caſe, 36.

Mich. 32 *Eliz.* In the Kings Bench.

See S. C. 4 Leon. 15

CCXXX. Hore *and* Wridleſworths *Caſe.*

HOre brought an Action of treſpaſſe againſt Wridleſworth, Quare clauſum & domum ſuam fregit. The Defendant pleaded, and put the Plaintiff to a new aſſignment: i. a Houſe called a Stable, a Barn, and another

another house called a Carthouse and Garnier, and that was assigned for Error, for that Assignment is not warranted by the Declaration. Gawdy, The same is good enough; for Domus in the Declaration, contains all things contained in the new Assignment. But if the Declaration had been of a Close, and the new Assignment of a Barn, it had not been good. Wray, Domus est nomen collectivum, and contains many buildings, as Barns, Stables, &c. and so was the opinion of the whole Court.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXXI. Savacres *Case.*

A Writ of Error was brought by Savacre and the Bishop of Glouceſter, M. 31 and 32 Eliz. upon a Judgement given in a Quare Impedit, for the Queen. And Errors assigned: 1. An Attachment was awarded against the Defendant in the Quare Impedit, returnable Quind. Pasch. at which Savacre appeared, and cast an Essoin; and notwithstanding that, a Distringas was awarded against them both, returned, Craft. Trin. and the awarding of the Distringas was erronious; for the Essoin was as an appearance for to save, &c. and therefore against him no Distringas ought to have been awarded: And upon alledging of Diminution, the Record of the Essoin was certified; for the same did not appear upon the Plea Roll. 2 The Record is, Ipsi in Misericord. and so both of the Defendants are amerced for the default of appearance, Quind. Pasc. whereas Savacre was then Essoined, and so no cause of amerciment of him. Coke, The originall Writ was here sued, Mic. 26 Eliz. returned Quind. Hillar. and then both the Defendants made default, for which an Attachment was awarded returnable, 15 Pas. and then Savacre appeared, and Judgement was given, Quod ipsi sint in Misericord. in which point the Error is assigned: But I conceive, that it is not Error; for upon the Attachment, the parties ought to put in sureties for their appearance: and the said sureties took upon them, that the Defendants, and each of them should appear, and if they, or one of them maketh default, the sureties should be amerced; and so here, this Judgement, Ideo ipsi in Misericord. shall referre to the sureties, not to the parties: for the Defendants shall not be amerced untill the end of the suit, and but once only in one action. which see, book Entries, 464. where there was but one Defendant; and therefore, If the amerciment shall referre to the Defendant, then it should be, Ideo ipse, not ipsi, &c. and that is the reason, wherefore neither the Queen nor an Infant shall finde pledges, for no amerciament shall be upon their default, therefore in vain for them to finde pledges, &c. And if the pledges be amerced where they ought not to be amerced by the Law, yet the Defendant shall not have Error upon it, for he is not the party grieved by that amerciament. And upon this reason it is, That in a Scire facias against the bail, if erronious Judgement be given against him, the Defendant in the Action shall not have a Writ of Error. The awarding of the Distresse upon the Roll against both, where the one of them onely makes default, is not error, especially as this case is; for although that one of them was Essoined untill the day aforesaid, yet at the said day they make default, and so the Distresse is well awarded against him; and although that the Writ were ill awarded; yet when they appear, Cr. Trinit. at the day of the return of the Distresse, all mean defaults in the Proces are saved, and so the misawarding of the Distresse, by appearance afterwards is supplied: As 39. E. 3. 7. The Law requires that in an Action grounded upon the Statute of Præmunire, 27 E. 3. the Defendant have warning by two Monthes; yet if the Defendant hath not had such warning, appeareth, the Proces is well enough: So 9 E. 4. 18. Where, in any

Proces the Defendant appeareth, although the day of appearance be not lawfull, yet the party ſhall be put to anſwer: and ſee many caſes there to the ſame purpoſe; and ſuch was the opinion of the Court in the principall Caſe. And as to the ſecond Erroꝛ, that the Judgement, Ideo ipſi in Miſeric. ſhall be referred to the ſureties only, and not unto the party; and that the Defendant ſhall be but once amerced in one action, the ſame is true, that he ſhall be but once amerced foꝛ one default; but if many defaults be, the Defendant ſhall be ſeverally amerced foꝛ every default: And it ſhould be unreaſonable that the ſureties ſhould be amerced, and that the Defendant who is as principal ſhould go free: See the book of Entries, 193. Ipſi & plegii ſui in Miſericordia, &c.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXXII. Farnams *Caſe.*

FArnam, Schoolmaſter, and others, were Indicted upon the Statute of 8 H. 6. foꝛ entring, In domum Rectoriæ de Putney, ac in cert. terras eidem domui part. jacen. in Putney, &c. Exception was taken to the Indictment, becauſe it recited the two parts of the Statute; 1 Expulſion and Diſſeiſin with foꝛce: 2 Holding out; and there is not any offence in it contained as to one of them; (ſcil.) Holding out; and although it was not neceſſary to recite the Statute, yet the party meddles with it, and doth not apply it to the ſpeciall matter, the ſame is naught: See foꝛ that the Caſe between Strange and Partridge, Plow. Com. 2 The entry is ſuppoſed, In domum & certas terras eidem domni pertinen. jacen. in Putney; which is incertain, as to the lands, and it is naught foꝛ the houſe alſo; foꝛ it is not ſhewed in what Town the houſe is, foꝛ this clauſe, ac certas terras eidem domui pertin. jacen. in Putney, is a diſtinct clauſe by it ſelf, and referres only to the lands, and doth not extend to the houſe: As to the firſt exception, it was diſallowed; foꝛ it is not like unto Partridges Caſe, foꝛ there the Statute is recited, which needs not, and thereforꝛe, being miſrecited, made the Indictment inſufficient; but here the Statute is well recited, and thereforꝛe as unto that matter, the Indictment is ſufficient: As to the ſecond exception, the Juſtices were of opinion, That the Indictment in that reſpect, was too generall and incertain: The third exception was not allowed; foꝛ the later woꝛds, i. e. in Putney, do referre to the whole, and extend as well unto the houſe as unto the lands: But as to theſe woꝛds, Lands to the ſaid houſe belonging, See the Caſe between Partridge and Croker, 7 E. 6. 85. where it is good enough, becauſe that the number of the acres is ſet incertain. And it was holden by the Court, That a Schoolmaſter is a good addition, foꝛ it is a myſterie, as a Scrivener; and afterward the Indictment foꝛ the houſe onely was holden good.

Mich. 32 *Eliz.* In the Chancery.

CCXXXIII. Gray *a Bencher of the* Temples *Caſe.*

GRay, a Bencher of the Temples Caſe, was this; It was found by Office, That one H. was ſeiſed in Fee of certain lands, called Drayners, and Codred, alias Codreth, in the County of Hertford, in his Demeſne as of Fee, and thereof enfeoffed certain perſons, unto the uſe of himſelf, and Anne Cape', with whom he afterwards intermarried, and of the heirs of their two bodies begotten, and of ſuch Eſtate dyed ſeiſed; and farther, it

was

was found, that the ſaid H. was alſo ſeiſed of other lands, in Barmeſden in his Demeſne as of Fee, and thereof dyed ſeiſed; and now came Gray into the Chancery, and ſhewed that the ſaid H. was ſeiſed of the ſaid land, called Drayners, in his Demeſn as of Fee, and thereof enfeoffed certain perſons unto the uſe of himſelf, and the ſaid Anne Capel, for the term of their lives, and afterwards, by his Indenture, dated the 23 of Decemb. and enrolled, bargained and ſold the Reverſion thereof to the ſaid Gray, &c. by force whereof, &c. Abſque hoc, that he was ſeiſed in tail, and abſque hoc, that he thereof dyed ſeiſed in his Demeſne, as of Fee-tail, as it is found by the ſaid Office: And for the land in Barmeſden, he ſaid, That the Lady Judde was ſeiſed thereof for the term of her life, the Reverſion to the ſaid H. in Fee, who granted to him the ſaid Reverſion in Fee, &c. abſque hoc, that he dyed ſeiſed in his Demeſne as of Fee, &c. And upon that, the Queens Attorney joyned iſſue, and the Venire facias iſſued, De Cottred & Barmeſden; and the Jury found, That H. did not make the Feoffment to the uſe of himſelf and Anne his wife in tail; and further found for Gray in all, &c. And it was Objected here, That the ſame is not a good and lawfull triall: For the land is alledged to be in Codrett, and the Venire facias is of Codred, &c. And although the Venire facias be well awarded, as unto Barmeſden, yet being naught in part, it is naught in all, which was granted by the whole Court; And then a new Venire facias ſhall iſſue forth for the whole. Another Objection was, becauſe he pleads that the Lady Judde was ſeiſed of that land for the term of her life, in which caſe Gray, who is in Reverſion, ought not to be admitted to this Traverſe, becauſe that Tenant for life, for any thing that is pleaded to the contrary, is yet alive; and it is cleer, that none ſhall be put to his Traverſe, but the party grieved; and here, he in the Reverſion upon an Eſtate for life, cannot be reſtored to the poſſeſſion, and by conſequence ſhall not have Traverſe: See for that, 6 H. 7. 15. and 37. Aſſ. 11. &c. 2 The ſeiſin in tail ought to be traverſed, and not the deſcent, or dying ſeiſed; for if they were ſeiſed and diſſeiſed, and ſo dyed, the Queen ſhall have the Ward. Coke, contrary, For Codred, and Cottered, idem ſonant, &c. And although that it be found by Office, That H. was ſeiſed of lands in Codred, alias Codreth, yet the Defendant ſupplies the ſaid matter; for he ſaith thus as unto the land in Codred prædicta; which words import that the ſaid land was known by the one name or the other; for this word prædicta, is as an Averment: which ſee 33 H. 8. Br. Averm. 42. And ſo here, this word prædicta is an Averment, that Cottered and Codred are one: and if ſo, then the Venire facias is well awarded. The Statute of 18 H. 6. gives Traverſe to thoſe which finde themſelves grieved by ſuch Offices, or which are put out of their Lands or Tenements; and we are within the Words of it, for upon the whole matter, we are out of poſſeſſion, as it was ruled in the caſe of one Stukely in the Court of Wards the laſt Term. If it be found by Office, That A. dyed ſeiſed of my Manor, and that he held the ſaid Manor of the Queen: Now I am out of poſſeſſion; and for that cauſe, The bargain and ſale of Dorrel to Sir Francis Walſingham was holden void by the whole Court: And 4 H. 6. 12. Traverſe is given in lieu of Petition; but he in the Reverſion may have Petition, therefore he ſhall be alſo admitted to Traverſe: and this caſe may be reſembled to the caſe of 2 E. 3. 32. where a Præcipe was brought againſt Tenant for life, and he in the Reverſion for life prayed to be received: It was ſaid by Thorp, That is not within the caſe of the Statute, for he is Tenant only in the Remainder, and it is poſſible that never ſhall have any thing; and the Statute ſpeaks only of Reverſion: and yet it was awarded, That he ſhould be received, otherwiſe great prejudice would follow. And here we are at prejudice; for now, by reaſon of this Office, we cannot have our Action of Waſt: Alſo here we need not to Traverſe the being ſeiſed

in tail, but it is ſufficient to traverſe the gift in tail; for if there be not a gift in tail it is not poſſible that he ſhould die ſeiſed in tail, which ſee, 2 E. 4. 15. by Laicon: Gawdy, Juſtice, conceived, That the triall is not good; for the Venire facias is not from the place where the land is; and this word (prædicta) doth not amount to an Averment; and the Caſe cited before is but the opinion of Brook. Wray ſaid, That as to the firſt exception, that it was good enough, for both the names, idem ſonant; and as to the Office, by that the Queen hath gained poſſeſſion; ſo as he who traverſeth cannot have an Action of Waſt: and ſo he is prejudiced by the Office, &c.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXXIV. Perchalls *Caſe.*

PErchall was Indicted upon the Statute of 5 E. 6. cap. 4. for drawing of his dagger in the Church againſt J. S. without ſaying, That he drawed it to the intent to ſtick the Plaintiff, and therefore the Indictment was holden void as to the Statute; and it was moved, If it ſhould not be a good Indictment for the aſſault, ſo as he might be fined for it? and by Sands, Clerk of the Crown, and the whole Court, The Indictment is void for the whole; for the concluſion of the Indictment is, contra formam Statuti, and there the Jury cannot enquire at the Common Law.

Mich. 32 *Eliz.* In the Kings Bench.

CCXXXV. Mead *and* Cheneys *Caſe.*

MEad brought an Action of Debt upon a Bond againſt Cheney, Executor of one Skipwith, and recovered; and upon a Fieri facias, the Sheriff did return Devaſtavit: and it was moved to have an Elegit, and the Juſtices would adviſe of it; and afterwards, at another day, a Preſident was ſhewed to the Court of 17 Eliz. and thereupon the Elegit was granted.

Trin. 32 *Eliz.* In the Kings Bench. *Rot.* 910.

CCXXXVI. Tompſon *and* Traffords *Caſe.*

IN an Ejectione firmæ, the Caſe was, That the Warden and Fellows of New Colledge in Oxford, 8 Eliz. Leaſed a Manſion houſe in the Burrough of Southwark, to one Standiſh, for 21 years, and afterwards, 25 Octob. 21 Eliz. they Demiſed the ſame Manſion houſe to the ſaid Standiſh for 21 years, to commence the Michaelmas after: And the Stat. of 14 Eliz. cap. 11. and 18 Eliz. cap. 11. were alſo found: And if this ſecond Leaſe ſhall be ſaid a Leaſe in Reverſion, and ſo void by the Statute of 14 Eliz? was the Queſtion. Foſter moved, That it is a Leaſe in Reverſion; for the firſt Leaſe doth continue until Michaelmas; and ſo was the opinion of the Juſtices of Aſſiſe at the triall. Towſe contrary: For when Standiſh accepteth the ſecond Leaſe, the ſame is preſently a ſurrender of the former Leaſe; for he giveth power unto the Leſſor for to contract for the houſe preſently; and to that purpoſe he cited Corbets Caſe, 8 Eliz. Coke, It is a ſurrender preſently, for you cannot apportion the Term. It was adjourned.

Mich.

Mich. 32 *Eliz.* In the Kings Bench.

Comyns 631
Style 162

CCXXXVII. Wood *and* Averys *Caſe.*

DEbt upon a Bond by Wood againſt Avery, the Condition was, That where the Plaintiff had Demiſed to the Defendant for terme of years, two Meſſuages, &c. If the Defendant at all times, during the term, ſhall maintain, ſuſtain and repair the ſaid two Meſſuages with good and ſufficient reparations, that then, &c. And the Defendant pleaded, That he had perfoꝛmed the Conditions in all, but as to one Kitchin, which was ſo ruinous at the time of the Demiſe, that he could not maintain oꝛ repair, and therefoꝛe he took it down, and rebuilt it again, in ſo ſhoꝛt time as he could poſſible, in the ſame place, ſo large, and ſo ſufficient in breadth, length and heighth as the other Kitchin was; and that the ſaid Kitchin all times after the re-edifying of it, he had ſuſtained and maintained, and well repaired, and demanded Judgement, &c. upon which Plea the Plaintiff did demurre in Law; and by the Court, the Plea were a good Plea, if it were in an Action of Waſt, but here, where he hath by his own Act tyed himſelf to an inconvenience, he ought at his perill to pꝛovide foꝛ it: And here it was ſaid, That if the Condition be impoſſible, the Bond is ſingle: contrary, where a man is charged by an Act in Law. 2 Saund. 420

Mich. 32 *Eliz.* In the Common Pleas

CCXXXVIII. Boſtwick *and* Boſtwicks *Caſe.*

DOrothy Boſtwick bꝛought Dower againſt Boſtwick an Infant, and the caſe was, That the husband of the Demandant was ſeiſed of certain lands holden by Knights-ſeꝛvice of M. C. and by his laſt Will, deviſed two parts of the Pꝛemiſſes to his Executoꝛs, during the nonage of his heir, and dyed, his heir within age; after whoſe death, M. C. entred into the third part, deſcended as Gardian in Knights-ſeꝛvice, and the Executoꝛs into the other two parts, upon which the Demandant bꝛought one Writ of Dower againſt the Guardian, to be endowed of the third part; and another Writ of Dower againſt the heir within age, in whom the Freehold of the two parts was; The heir appearing by Attoꝛney, pleaded to iſſue, which was found foꝛ the Demandant; but the Judgement was afterwards reverſed, becauſe the heir, being within age, did not appear by Guardian but by Attoꝛney; foꝛ which cauſe ſhe again bꝛought a Writ of Dower againſt the heir, and the Sheriff did retoꝛn him ſummoned, but the heir made default; foꝛ which cauſe, the Court was moved in the behalf of the Demandant, to have the aid of the Court in this caſe: foꝛ if upon default of the Tenant, a Gꝛand Cape ſhould iſſue foꝛth, and ſo a Recovery by default ſhould follow; the ſame would be Erroꝛ: which ſee, 6 H. 8. Br. Liver. Defaul. 50. And therefoꝛe it was pꝛayed, that ſome perſon be appointed Guardian to the heir, who may appear and plead foꝛ him, foꝛ otherwiſe the Demandant is at great miſchief; foꝛ otherwiſe the Guardian now will not ſuffer the heir to appear in perſon: And if the widow now demandant ſhould ſtay foꝛ her Dower untill the heir ſhould come of full age, it would be a great miſchief: But by Walmeſley, Periam, and Windham, We cannot appoint a Guardian to the heir foꝛ his appearance here, unleſſe the heir be here in perſon in Court befoꝛe us; and he was appointed to be bꝛought in perſon into Court.

Mich.

Mich. 32 *Eliz.* In the Common Pleas.

CCXXXIX. *Sir* Anthony Dennys *Caſe.*

SIr Anthony Denny, ſeiſed in Fee of the Manno; of Cheſſam, extending into Cheſſam, and in the Town of Hertford, and alſo of other lands in Hertford, by his laſt Will, deviſed the Manno; of Cheſſam to Henry Denny his ſon and heir in tail; and his lands in Hertford, to Edward Denny his younger ſon, &c. It was holden by Walmſley, Periam, and Windam, (abſent. Anderſon) That the younger ſon ſhould have that part of the Manno; of Cheſſam, which lyeth in the Town of Hertford. Another point in the Caſe was, That upon the death of Sir Anthony, Office was found without any mention of this Deviſe; fo; which cauſe, the Queen ſeiſed, and Leaſed all the lands ſo deviſed to a ſtranger, during the mino;ity of the heir. The heir comes of full age, and hath Livery of the whole, and without any expreſſe entry, leaſeth the lands fo; years, rendring Rent; the Leſſee entreth, and payeth the Rent to the heir, the heir dyeth, The Leſſee aſſignes over his term, and the Rent is yearly paid to the right heir of Sir Anthony: And now Edward Denny entred, and per Curiam his entry is lawfull; fo; if the heir entreth in this caſe, and many deſcents follow; yet the Deviſee may enter at any time, fo; his entry doth not make any abatement o; wrong, but may well ſtand with the Deviſe; fo; if the Deviſe be waved, o; the Deviſee doth deferre the execution of the Deviſe, it is reaſon that the heir enter and take the pro;fis, untill the Deviſee entreth: But if a ſtranger abateth after the death of the Devi;o;, and dieth ſeiſed, the ſame ſhall take away the deſcent.

Trin. 28 *Eliz.* In the Kings Bench.

CCXL. *The* Caſe *of the Town of* Leiceſter *for Toll.*

AN Action of treſpaſſe, Tam pro Domina Regina, quam pro ſeipſo; and ſhewed, That the Town of Leiceſter is an ancient Town, and ancient Demeſne, and the Inhabitants there have uſed to be diſcharged of Toll; and that the Queen by her Letters Patents, gave command to all Bailiffs, Sheriffs, Mayo;s, &c. That thoſe of Leiceſter ſhould be diſcharged of Toll; and notwithſtanding that, That the Defendant took Toll, &c. Exception was taken, becauſe that the ſuit was pro;ecuted, Tam pro Domina Regina, quam pro ſeipſo: whereas the party grieved was only to have the info;mation, See the Caſe, 49 E. 36. Where the Writ is, ad reſpond. tam pro nobis, quam, &c. and no exception is taken to it: Another exception, The Plaintiff declares, That Leiceſter is an ancient Town, and ancient Demeſne, and doth not ſhew, that it is parcel of a Manno;: See 20 E. 3. Ancient Demeſ. 25. ſuch exception is taken, but after, the Defendant pleads, That all ſuch Towns, whereof the land in queſtion is parcell, is ancient Demeſne; and ſuch plea was holden good: See 30 E. 3. 12. parcell of a Manno;, which is ancient Demeſne; and the Plaintiff replied, Ab'que hoc, that it is parcell of the Manno;: Another exception, That lands holden in Socage onely, and no other ought to be diſcharged of Toll; and here it is not ſhewed in the Declaration, that the place where, &c. is holen in Socage, To which it was anſwered, That the ſame needs not to be ſet down in the Declaration; fo; that is imp'i'd in theſe wo;ds, Ancient Demeſ. fo; other wiſe it cannot be but Socage and onely, and of no other Tenure: A fourth Exception, The Letters

Letters Patents here ſhewed in diſcharge, are of no value; for the King by his Letters Patents cannot diſinherit any one, Erg. nor diſcharge one of Toll which is a kinde of diſinheritance; To which it was ſaid, That the Plaintiff doth not declare of any Grant, but of an uſage or cuſtom, for thoſe of ancient Demeſne; and further, hath commanded by the ſaid Letters Patents, that ſuch cuſtoms and uſages ſhould hold place; and upon the cuſtom, and the contempt, this Action is grounded: A fifth exception, becauſe the Plaintiff hath not ſhewed, that the Toll whereof the Plaintiff hath counted, was concerning things for proviſion for their houſes, manurance of their lands, &c. 7 H. 4. 111. In an Action upon the Caſe for not paying of Toll, The Defendant ſaid, That he held certain lands of R. Lord of the Manor of H. which Manor is ancient Demeſne, of which Manor all the Tenants have been free, to ſell or buy beaſts or other things, for the manurance of their lands, and maintenance of their houſes, without paying Toll in any Market or Fair, &c. And ſo juſtifies, that he came to the ſame Market, and bought certain beaſts, as the Plaintiff had declared, and that ſome of them he uſed about his manurance of his lands, and ſome of them he put into paſture to make them fat, and more fit to be ſold, and afterwards, he ſold them at ſuch a Fair, &c. and the opinion of the Court was with the Defendant: And by Godfrey and Coke, Such Tenants ſhall be diſcharged of Toll, not onely for buying of things which concern their ſuſtenance, proviſion, and manurance of their lands, but alſo for all things bought, as common merchandizes: 28 Aſſ. ult. by Thorp, Green, and Seton, of all things bought by any for his own uſe, they ſhall be quit of Toll: and then, If the privilege of Tenants in ancient Demeſne, ſhall not be quit of Toll, but for things bought for their ſuſtenance, proviſion and manurance of their lands, they have no more favor then ordinary Subjects: See 19 H. 6. 66. Some are of opinion, That ſuch Tenants ſhall not pay Toll for things ſold and bought, coming upon their lands, and touching their ſuſtenance: See F. N. B. 228. D. ſuch Tenants are diſcharged of Toll for all things by them ſold and bought, by way of merchandize; as alſo of things of neceſſity, as ſuſtenance: And ſee Crook, in the caſes of Itiner. 138. he conceives, that ſuch Tenants for merchandizes ſhall pay Toll as other merchants; but ſee the Writ of F. N. B. 228. the words are, De bonis, & rebus ſuis, And Coke ſaid, That he had found the reaſon wherefore ſuch Tenants ſhould be quit of Toll throughout the Realm, in an ancient Reading, viz. That all the lands in the hands of Edw. the Confeſſor and Wil. the Conqueror ſet down in the Book of Doomſday were ancient Demeſne, and ſo called Terræ Regis, and they were to provide victuals for the Kings Garriſons, for then they were troubleſome times; and for thoſe cauſes, and becauſe they made proviſions for others, they had many privileges, amongſt which this is one; Ut quietius aratra ſua exercerent, & terram excolerent: The Lord himſelf, in ancient Demeſne ſhall not have ſuch privilege, for his Seignory is pleadable at the Common Law: Vid. F. N. B. 228. B. And he ſaid, That the Plaintiff ought to alledge, that his lands are parcel of ſuch a Manor; for there cannot be ancient Demeſne, if there be not a Court and Suitors, &c. And he granted, that ſuch a Town might be ancient Demeſne of the Crown, but yet they ſhall not have the privileges and liberties which the Tenants in ancient Demeſne have. Towns were before Manors: London hath the name of ancient Demeſne, and yet they have not ſuch liberties, nor the lands in it pleadable by Writ of right Cloſe. 7 H. 6. 31, 32. Shute, Juſtice, was of opinion, That an Inhabitant within ancient Demeſne, although he be not Tenant ſhall have the privileges: See for that, F. N. B. 228. B. Tenants at will in ancient Demeſne ſhall be diſcharged of Toll, as well as Tenants of the Freehold for life, or for years, 37 H. 6. 27. by Moile. London is ancient Demeſne; for they preſcribe, that a Citizen who hath

there

there dwelt, &c. ſhall not be taken from thence by Capias, or Attachment, Billing. London is not in the Book of Doomeſday: Moile, They make their Proteſtation in a Writ of Right Patent: Littleton, That is uſed in divers places, and at this day in Exeter: And by Clench, If a Tenant in ancient Demeſne levyeth a Fine of his lands, then he ſhall not have the privilege, untill the Fine be reverſed, Quod fuit conceſſum: If the Lord of a Manor in ancient Demeſne, purchaſeth all the Tenancies, the whole privilege is gone, which Coke denyed. The Caſe was adjorned.

Trin. 28 *Eliz.* In the Common Pleas.

CCXLI. Lennards *Caſe.*

IN the Caſe of Lennard, Cuſtos Brevium, who was Plaintiff in an Action of Treſpaſſe for breaking of his Cloſe; The Defendant pleaded, That William Heydon was ſeiſed of the lands, and enfeoffed him: And upon Ne enfeoffa pas, the parties were at iſſue; and it was found by ſpeciall Verdict, That the ſaid William Heydon was ſeiſed, and leaſed the Lands to the Defendant for years; and afterwards he made a Deed of Feoffment to the ſame Leſſee of the ſame Lands in Fee, by the words of Dedi & conceſſi, with a Letter of Attorney within the ſaid Deed, to make Livery to the Leſſee; and the Deed of Feoffment was delivered to J. to deliver the ſame to the ſaid Leſſee, who delivered the ſame accordingly: The Leſſee delivered the ſame to the Atorney named in the Deed, who made Livery accordingly: And it was moved by the Councel of the Plaintiff, That upon all this matter, here is not any Feoffment: And by Walmeſley, Serjant, This Deed ſo delivered, tooke its effect preſently as a confirmation; and then the Livery and Seiſin comes too late; for as ſoon as the ſaid Deed was delivered to the Leſſee for years, the Law gave to it, its operation to this effect, To veſt the Fee and the Freehold in the Leſſee by way of confirmation: See for that, Littl. 532, 533. But the whole Court was of a contrary opinion; for it is in the election of the Leſſee to take the Conveyance as a Feoffment, or as a confirmation: And here it appeareth upon the Deed, that the intent of both parties was, That the Leſſee ſhould take by way of Feoffment, and not of confirmation; for otherwiſe, to what uſe ſhould be a Letter of Attorney inſerted in the Deed? And here the Leſſee hath liberty to make his election how he will take; either by Feoffment, or by confirmation, which election he hath determined by the acceptance of the Livery: And by Anderſon, If tenant in tail be diſſeiſed, and makes a Charter of Feoffement, and delivers the ſame to the Diſſeiſor, who delivers the ſame to the Attorney, named in the Charter, who makes Livery accordingly: here is a good Feoffment, and a diſcontinuance; and afterwards, after many motions made, and day given to ſhew cauſe, Judgement was given, that the Plaintiff ſhould be barred.

Trin. 28 *Eliz.* In the Common Pleas.

CCXLII. Rooke *and* Dennys *Caſe.*

IN an Action upon the Caſe, by Rooks againſt Dennis, for miſuſing of the Plaintiffs Horſe, by occaſion of which miſuſe, the ſaid Horſe became blind of one eye, and gall-back'd, the Plaintiff counted, That the ſaid Horſe was ſtolen by three Felons, after whom the Plaintiff made freſh ſuit, and that the Felons were apprehended, and attainted at his ſuit before Juſtice Windam: and that the ſaid Horſe came unto the hands of the Defendant, who

who miſuſed it, Ut ſupra: The Defendant ſaid, that before that, and the ſaid Attainder of the ſaid Felons, the ſaid Felons had waived the ſaid Houſe within his Manor; in which Manor he had waife and eſtray, &c. And it was holden by the Court, that the ſame was no Plea, without traverſing the freſh ſuit, whereof the Plaintiff hath declared; for by the freſh ſuit, the property of the Plaintiff in the ſaid Houſe was preſerved; and ſo upon that miſuſer of the Houſe by the Defendant, an Action well lyeth: and Judgement was given for the Plaintiff accordingly.

Hill. 29 *Eliz.* In the Kings Bench.

CCXLIII. Pretiman *and* Cookes *Caſe*.

IN Ejectione firmæ, The Caſe was: That one Hawkins was ſeiſed of three Meſſuages in Bury, and had iſſue, Robert, a ſon, and Chriſtian and Joan, daughters; and by his Will, deviſed his three Meſſuages to his wife for life, the remainder of one of them to Robert his ſon and his heirs, and the remainder of another of them to Chriſtian his daughter, and her heirs; and the remainder of the third Meſſuage, to Joan his daughter, and her heirs: And further willeth, That if any of his ſaid three iſſues ſhould dye without iſſue of his, or her body, that then the other ſurviving, ſhall have, Totam illam partem, betwixt them equally to be divided; The Deviſor dyed, the wife dyed, one of the daughters dyed, having iſſue; the ſon dyed without iſſue, the ſiſter ſurviving, entred into the whole part of Robert, the ſon, and dyed; her husband held in the land as tenant by the Curteſie; and the queſtion was, If the ſurviving daughter ſhould have all the part of him that dyed without iſſue, or ſhe and the iſſue of the other daughter? Coke, The ſurvivor ſhall have the whole: And he ſaid, that the Deviſees have an Eſtate in tayl, for the Fee doth not veſt in them, for it is incertain which of them ſhall ſurvive; but when one ſurviveth, then he ſhall not have for life, but in Fee; for the words, Totam illam partem, goes as well to all the Eſtate, as to all the things. A. tenant for life, the remainder to B. in tayl, the remainder to the right heirs of A. A. grants, Totum ſtatum ſuum, both the Eſtates paſſe, and the Grant includes the whole; See 41 E. 3. Fitz. Br. 541. In Raviſhment of Ward, ſuppoſing the raviſhment of two daughters, Quarum maritagium ad ipſum pertinet, and it was challenged, becauſe he doth not ſay Maritagia, but the challenge was not allowed: and he ſaid, That if a man deviſeth his land wholly to A. that he hath a Fee-ſimple: See the Caſe, H. 28 Eliz. the Caſe between Higham and Harwood: And Coke ſaid, That they had by this Deviſe a Fee-tail, with a Fee-ſimple, Expectant, each of them ſeverally in the Meſſuage to them limited: Golding, Each of the Deviſees hath an Eſtate-tayl in the Meſſuage, to them deviſed, and but an Eſtate for life in the Meſſuage which is to accrue upon the death without iſſue, &c. For no Eſtate is limited expreſly, nor what Eſtate the ſurvivor ſhall have; for here are not any words which do import a Fee-ſimple, as (according to Littleton) imperpetuum; or to do what he will with, &c. See for that, 22 E. 3. ad Terminum qui præteriit: but here are only bare words, of which no further conſtruction can be made, but for life: And as to the words, Totam illam partem, the ſame doth not extend further, then if he had ſaid, Partem ſuam: And he ſaid, that nothing veſts in him who ſurvives; for there ought to be two to take by the ſurvivor, or otherwiſe nothing ſhall accrue to the ſurvivor; for the words of the Deviſe are æqualiter inter eos dividend: and that which accrues by ſurvivor ſhall be divided betwixt two, otherwiſe nothing ſhall accrue. And if it cannot ſurvive to two, then it ſhall deſcend to the iſſue of the ſiſter who is de- and to

the ſurviving daughter, and they ſhall be tenants in common, and not joynt-tenants. Clench, Theſe words, Totam illam partem, go only to the houſe, and not to the Eſtate in it, which Shute granted: If both the daughters had ſurvived Robert, they ſhould have Fee in the houſe of Robert not by the Will, but by deſcent; and this Deviſe ſhall not take effect otherwiſe, and the Deviſe as to that is void, and then the Common Law ſhall hold place, and that is, to deſcend to the iſſue of the one ſiſter, and the ſurviving ſiſter: And here the ſurvivor hath but an Eſtate for life in the houſe of Robert, and then by the death of Robert, the Fee-ſimple accurring to the ſurviving ſiſter, the moyetie of her Eſtate for life is extinct. And if one of the daughters had dyed without iſſue before Robert, the houſe of ſuch daughter had come to Robert and the other ſiſter, as coparceners; for the ſon is to have all the Fee, and a moyetie of the ſame executed, and a moyetie expectant, and the other ſiſter ſhould have a moyetie for life, and ſo the Deviſe not void. And afterwards Judgement was given againſt the husband of the ſurviving daughter.

Hill. 29 *Eliz.* In the Kings Bench.

CCXLIV. Hurlſtons *Caſe.*

HUrlſton brought a Writ of Error againſt the Queen, upon a Judgement given for the Queen, in the County Palatine of Cheſter; It was moved by Gawdy, the Queens Serjeant, that the Writ did not lye; for he ought to ſue to the Queen by Petition, which ſee 23 E. 3. 22 A Writ of Error cannot be granted, Abſq; ſpeciali gratia Dom. Regis: See alſo 22 E. 3. 3. And the caſe was, That Judgment was given for the Queen in a Scire facias, to reverſe the Patent of the Conſtableſhip of the Caſtle of Cheſter, and by him in Cheſter, there are many Courts; Kings Bench, Common Pleas, Exchequer, Chancery: And here a Judgement or Decree in the Chancery cannot be reverſed, but by Parliament; and ſo be conceived of a Judgement given in the Chancerie at Cheſter, and it cannot be reverſed in the Kings Bench: Alſo they have a cuſtom in Cheſter, that they may reverſe within certain Months the Judgement before. Clench, There needs no Petition, for both the Patentees claim from the Queen; and whether there be Error or not, the Queen is not prejudiced: Coke, There needs no Petition, for it is now paſt, for the Queens Attorneys hand is to it; 11 Eliz. In one Haunces caſe, a Writ of Error was brought againſt the Queen, and they were compelled to ſue to the Queen by Petition: Coke, In the Exchequer, If an erroneous Judgement be given for the Queen in a Bill of Intruſion, the party ſhall have a Writ of Error againſt the Queen without any Petition. It was the caſe of one Eliz. Mordant, 15 Eliz. ſhe brought a Writ of Error to reverſe a Fine, levyed by her, during her minority, againſt the Queen, and the proceeding in it was ſtayed, becauſe ſhe had not ſued to the Queen by Petition firſt: Wray, Many Outlawries have been reverſed by Error without any Petition, and yet in ſuch caſe the Queen hath an immediate intereſt.

Mich. 29 *Eliz.* In the Kings Bench.

CCXLV. Gomerſall *and* Gomerſalls *Caſe.*

IN an Account, The Plaintiff charged the Defendant as Bailiff of his Shop, Curam habens, & adminiſtrationem bonorum: The Defendant anſwered of the goods onely, and ſaid nothing to the Shop: Tanfield moved the

the ſame matter for Error in arreſt of Judgement: As 14 H. 4. 309, 310. One charged another as Bailiff of his houſe, Et Curam habens bonorum in eo exiſtentium; the traverſe was, That he was not Bailiff of the houſe, Pro ut: that is good, and goeth to all, but he cannot anſwer to the goods, and ſay nothing to the houſe: See 49 E. 3. 7. Br. Accomp. 21. A man brought an Account againſt one as Bailiff of his Mannor, Habens Curam, of twenty Oxen and Cows, and certain quarters of Corn: And by Belknap, If he have the Mannor and no goods; yet he ſhall account for the Mannor, and it ſhall be no Plea, to ſay that the Plaintiff ſold him the goods without traverſing, without that, that he was his Bailiff to account render: And as to the Mannor, he may ſay, that the Plaintiff leaſed the ſame to himſelf for years, without that, that he was his Bailiff: Another exception was taken by him, That the Plaintiff chargeth him with moneys, Ad Merchandizandum; And he traverſeth, that he was not his Receivor denarior. ad computandum pro ut: and ſo he doth not meet with the Plaintiff, and ſo it is no iſſue. And it is not helped by the Statute of Jeofailes, 32 H. 8. but miſjoyning of iſſue is helped by that Statute, 19 Eliz. W. an Attorney of the Common Pleas, did charge another Attorny of the ſame Court of Pleas, with a Covenant to have three years board in marriage with the Defendants daughter; and he pleaded that he did not promiſe two years board, and ſo iſſue was joyned and tried, and the ſame could not be helped by the Statute, becauſe it was no iſſue, and did not meet with the Plaintiff: So, If one charge one with, Debet & detinet, and he anſwers to the Detinet onely, it is no iſſue; and therefore it is not helped by the Statute. In 29 H. 6. In treſpaſſe for entring into his houſe, and taking of his goods, the Defendant pleaded, Non intravit, and the iſſue was tried, and damages given; and becauſe the taking of the goods was not alſo in iſſue, all was void, 4 E. 3. One ſhall not account by parcels, becauſe the Action is entire: See 3 E. 3. 8. and Book of Entries, 202. A Preſident, 14 H. 7. That the Verdict was not full, and did not go to the whole, and therefore was void. Hele Serjeant contrary: And as to the firſt point, he ſaid, That there is a caſe in 9 E. 3, Accompt: 35. where the Plaintiff chargeth the Defendant in account as Bailiff of his houſe; and that he had the adminiſtration of his goods; viz. Fourty ſacks of wooll; and upon iſſue joyned, the Jury found, that he was not Bailiff of his houſe; but they further finde, that he had received the fourty ſacks of wooll, to render account of the ſame; and the Plaintiff in that caſe had Judgement for the ſacks of wooll; Although there was no Verdict found for the houſe: See 5 H. 7. 24. Where, If a Jury be charged with ſeverall iſſues, and the one of the iſſues is found, and the other not; that the ſame makes no diſcontinuance: or if one of the iſſues be diſcontinued, yet it is no diſcontinuance as to the whole. But admit the ſame be not helped by the Common Law, yet he ſaid, It is helped by the Statute of 32 H. 8. of Jeofailes; which is, Non obſtant. diſcontinuance, or miſcontinuance. Daniel, to the ſame purpoſe: And he ſaid, that the Books before cited of 14 H. 4. and 49 E. 3. are not ruled, nor the caſes there adjudged; for in the one Book the Defendant pleaded, That the Plaintiff gave the goods unto him, and in the other Book, that he ſold the ſaid goods unto him, and demanded Judgment of the Action: And he ſaid, That it is no good anſwer; for they are pleas onely before the Auditors, and not in an Action upon Account: and further he ſaid, That although the Verdict be found but for part, yet it is good; for no damages are to be recovered in an Account: In treſpaſſe, it is true, If one iſſue be found, and not the other, and joynt damages be given; the Verdict is not good for any part, but if ſeverall damages be given, then it is good, as it is ruled in 21 H. 6. Coke, 26 H. 8. is, That the Plaintiff cannot declare generally of an houſe, Curam habens, & adminiſtrationem bonorum; but he muſt further ſay: Twenty quarters

of Corn, or the like, &c. In the principall Caſe, it is a joynt-charge and but one for the ſhop and goods; and he anſwers unto one onely, but he ought to anſwer to all, or elſe it is no anſwer at all. But Coke found out another thing, viz. That there is a thing put in iſſue which is not in the Verdict, nor found, nor touched in the Verdict, and that was the Verdict of all which is found not to be good, and it is not helped by the Statute of 32 H. 8. of Jeofailes. I grant, that diſcontinuace are helped by the Statute of 32 H. 8. but imperfect Verdicts are not helped thereby: It was a great Caſe argued in the Exchequer Chamber, and it was Braches Caſe: An information was againſt Brache, for entring into a houſe, and an hundred acres of lands in Stepney; he pleaded, Not guilty, The Jury found him guilty for the hundred acres, but ſaid nothing as to the houſe; upon which a Writ of Error was brought, and Judgement was reverſed: and he ſaid, it was not a diſcontinuance, but no Verdict for part. Daniel, That was the default of the Clerks who did not enter it, and it hath been the uſage to amend the defaults done by the Clerks in another Term: All the Juſtices ſaid, That is true, if the Poſtea be brought in and not entred; but here it is entred in the Roll in this form: Daniel, Where I charge one in Account with ſo much by the hands of ſuch a one, and ſo much by the hands of ſuch a one, although there be but one Abſque hoc to them all, yet they are as ſeverall iſſues. The Court anſwered, Not ſo, unleſſe there be ſeverall iſſues joyned to every one of them; But by Gawdy, Juſtice, If there be ſeverall iſſues, and the one be found, and the other not, no Judgement ſhall be given: Clench, Juſtice, In the principall Caſe, It is not a charge of the goods, but in reſpect of the ſhop, therefore that ought to be traverſed: Shute, Juſtice; The traverſe of the ſhop alone is not good: Egerton the Queens Sollicitor ſaid, That the Books might be reconciled, and that there needed not a Traverſe to the goods, for the Traverſe of the ſhop, Pro ut, is an anſwer to all: But now he takes iſſue upon the goods onely, which iſſue is not warranted by the Declaration; and he ſaid, That if one charge me as Bailiff of his goods, ad Merchandizandum, I ſhall anſwer for the increaſe, and ſhall be puniſhed for my negligence; But if he charge me as his Receiver, ad Computandum, I ſhall not be anſwerable, but for the bare money, or thing which was delivered.

CCXLVI. *Mich.* 29 *Eliz.* In the Common Pleas.

IN Treſpaſſe for taking of goods, the Defendant juſtified, as Bailiff to J. S. The Plaintiff by Replication ſaith, That the Defendant preſt his Cattell of his own wrong. Abſque hoc, that he is Bailiff to J. S. And by Anderſon, If one hath good cauſe to diſtrain my cattell, and a ſtranger of his own head, without any warrant or authority takes my goods, not as ſervant or Bailiff to another, and I bring treſpaſſe againſt him he cannot excuſe himſelf by ſaying, that he did it as Bailiff, &c. for once he was a treſpaſſor; but if one do diſtrain as Bailiff, although that in truth he be not Bailiff, if afterwards, he in whoſe right he juſtifies aſſents to it, he ſhall not be puniſhed as a Treſpaſſor; for this aſſent ſhall have relation unto the time of the diſtreſſe taken, which Periam conceſſit, and alſo Rhodes. A. diſtrains, and being asked for what cauſe he diſtrains, and he aſſigns a cauſe which is not ſufficient, and afterwards an Action is brought againſt him, he may avow the diſtreſſe for another cauſe.

Mich.

CCXLVII. *Mich.* 29 *Eliz.* In the Common pleas.

The Caſe was; That the Queen gave lands in tail to hold in Capite, and afterwards granted the Reverſion: Windham, In this caſe the Tenure is not incident to the Reverſion, but is in reſpect of the perſon; and therefore the Tenure in Capite doth remain; and the Donee ſhall hold of the Queen as in groſſe: and alſo the Grantee of the Reverſion, ſhall hold of the Queen in Capite; and ſo two Tenures in Capite for the ſame lands: See 30 H. 8. Dyer, 45. If the Queen in this cauſe had reſerved a Rent upon the Gift in tail, the ſame ſhould go with the Reverſion.

Mich. 29 *Eliz.* In the Kings Bench.

CCXLVIII. Dighton *and* Clarks *Caſe.*

Dighton brought Debt upon a Bond, the Condition of which was; That whereas the Plaintiff was in quiet poſſeſſion of ſuch lands, If now neither J. S. nor J. B. nor J. G. did not diſturb the Plaintiff in his poſſeſſion of the ſaid lands by any indirect means, but by due courſe of Law, That then, &c. that Defendant pleaded, That neither J. S. nor J. D. or J. G. did diſturb the Plaintiff by any indirect means, but by due courſe of Law; upon which there was a demurrer. Godfrey, The Plea in Bar is not good; for there is a Negativa pregnans, (ſcil.) a Negative which implies an Affirmative: See 21 H. 6. 9. In a Writ of Entrie, Sur Diſſeiſin, the Defendant ſaith, That the Demandant by his Deed, after the Darrein continuance, did confirm and ratifie the poſſeſſion of the Tenant, &c. The Demandant ſaid, Not his Deed after the Darrein continuance; and the ſame was holden to be, Negativa pregnans; See more there, and ſee alſo, 5 H. 7. 7. And ſee further, 39 H. 6. 8. and 9. Another Exception was taken to the Plea in Bar, becauſe he hath pleaded, That neque J. S. neque J. D. neque J. G. had diſturbed the Demandant by any indirect means, but onely by due courſe of Law, and that iſſue cannot be tried; not by the Countrey, for they cannot know what is a due courſe of Law; and by the Court it cannot be tried; for the Defendant hath not certainly ſhewed by what due courſe of Law the Demandant hath been diſturbed, which ſee 22 E. 4. 40, 41, &c. The Lord Liſles Caſe. In debt upon a Bond, the Condition was, That if the Defendant before ſuch a day, or any other for him, and in his name, come to B. and there ſhew unto the Plaintiff, or one of his Councel by him aſſigned, a ſufficient and lawfull diſcharge of an Annuall Rent which the Plaintiff claims out of two houſes of the Defendant in B. aforeſaid, That then the ſaid Bond ſhall be void; and the Defendant ſaid, That he at the day aſſigned, contained in the Condition, that A. and B. by aſſignment of the Defendant came to B. and tendered to ſhew to N. and W. of the Plaintiffs Councel, a ſufficient diſcharge of the ſaid Annuall Rent, and that they did refuſe to ſee it, upon which there was a demurrer in Law: and Judgement was given for the Plaintiff, and that the Plea was no Plea; for the Defendant ought to have ſhewed in his Plea, what manner of diſcharge he would have ſhewed, as a releaſe, unity of poſſeſſion, &c. But as the Caſe is here; If the Plaintiff ſhall traverſe the Plea in Bar, the iſſue joyned upon it cannot be tried; for the Jury cannot know which is a lawfull and ſufficient diſcharge, but the ſame ſhall be tried by the Court; for if the Defendant had tendered to the Plaintiff a diſcharge, by unity of poſſeſſion, the Jury cannot know if it be a ſufficient diſcharge: and as the Plea is here, he hath not ſhewed what diſcharge he would have ſhewed to the ſaid Councell;

Councell; and therefore we cannot judge of the ſame: If one be bound to plead a ſufficient Plea before ſuch a day, in ſuch a Court, in ſuch an Action, it is not ſufficient that he hath pleaded a ſufficient plea, but he ought to ſhew what Plea he hath pleaded, otherwiſe the Court cannot judge if the Plea be ſufficient or not: Vid. 35 H. 6. 19. and 37 H. 8. Br. Cand. 16. where a man will plead that he hath ſaved the party harmleſſe, he ought to ſhew how. Shute, Juſtice, and Clenche, Juſtice, If the Defendant had pleaded, Not diſturbed by any indirect means, ſuch a Plea had been good enough: Gawdy, Juſtice, If he had pleaded, Not diſturbed, Contra formam Conditionis prædict. it had been a good Plea; In a Writ of Entrie, Ne entra pas, contra formam Statuti, He did not alien within age, is a Negative pregnant: but the party may ſay, He did not alien, Modo & forma; all the part of this Plea which comes after the But, is ſurpluſage and Negation: Gawdy, It is a Plea which is pleaded with all the words of the Condition intirely. Clenche, The Caſe put by Godfrey, 22 E. 4. differs from the Caſe at Bar: For there he pleaded all in the affirmative, therefore in ſuch a Caſe he ought to plead ſpecially; but in the Caſe at Bar, all is in the Negative, in which Caſe ſuch ſpecial pleading is not neceſſary. If I be bounden that I ſhall not go out of Weſtminſter-hall untill night, but tarry in the Hall till night, In an Action againſt me upon that Bond, I may plead in iiſdem verbis: If I be bound upon Condition, That I will not return to Serjeants-Inne the direct way, but by St. Giles, I ſhall plead, in totidem verbis: Godfrey, I agree thoſe Caſes, for the matter which comes after the But, is triable by the Countrey, but ſo it is not in the principall Caſe: Clenche, But, is but a word of ſurpluſage, and if that, and all which follows had been left out, it had been well enough. It was adjorned.

Mich. 26 *Eliz.* In the Common Pleas.

CCXLIX. Courtney *and* Kelloways *Caſe.*

COurtney brought an Action upon the Statute of 5 Eliz. concerning Perjury againſt Kellpway, and declared, That where Sir Gawen Carew had heretofore brought an Action upon the Caſe againſt the now plaintiff for ſlanderous words, viz. becauſe that the ſaid now Plaintiff had affirmed, that the ſaid Sir Gawen had had the Pocks, To which Declaration, the now Plaintiff had pleaded, that Kelloway the now Defendant, reported to the ſaid now Plaintiff, That he himſelf, i. e. Kelloway, had heretofore healed the ſaid Sir Gawen of the Pocks, Abſque hoc, that he ſpake them ſimply of his own head; upon which they were at iſſue, and the ſaid Kelloway was produced as a witneſſe on the part of the ſaid Courtney; and the ſaid Kelloway, upon his oath, depoſed at the triall of the ſaid iſſue, That he never had reported to the now Plaintiff, That he himſelf had healed the ſaid Sir Gawen of the Pocks; for which the Jury found for Gawen, and alſo aſſeſſed greater damages in reſpect that they found, That Courtney ſpake the ſaid words of his own head, &c. and not of the report of Kelloway. It was the opinion of the whole Court, that the Plaintiff ſhould have this Action; For notwithſtanding that, that oath doth not trench much unto the iſſue, the proof, or diſproof of it, yet becauſe that by reaſon of that oath, the Jury have aggravated the damages, the Action doth lie, as in caſe of Treſpaſſe of breaking his Cloſe, and ſpoiling his graſſe, the Defendant pleads, Not guilty, and at the triall of the iſſue, a witneſſe is produced on the Plaintiffs part, who depoſeth upon his oath, That the land where, &c. was ſo rich in graſſe, that it was ready to be mowed, whereas, in truth, none, or very little graſſe was there growing, yet if the Jury finde upon other evidence the Defendant guilty,

guilty, it is an occaſion to induce the Jury to tax the greater damages: all which the Court granted.

Mich. 26 *Eliz.* In the Common Pleas

CCL. Holland *and* Drakes *Caſe.*

IN an Ejectione firmæ, brought by Holland againſt Drake, and five others; Drake pleaded, Not guilty; the other five, Quoad 20 acres, pleaded, Not guilty alſo; and as to the reſidue, that long time before that, Andrews (Leſſor of the Plaintiff) had any thing in the land; That Hen. Lord Cromwel was ſeiſed, and leaſed the ſame to them for two years, and afterwards granted the Reverſion to Andrews, to whom they attorned; Andrews within the ſaid term, entred upon them, and leaſed to the Plaintiff upon whom they re-entred, as was lawfull for them to do, The Plaintiff by Replication, ſaid, That long time before the ſaid Lord Cromwel had any thing, &c. Andrews himſelf was ſeiſed, untill by the ſaid Lord Cromwel diſſeiſed, and leaſed to the Defendants, Ut ſupra, and granted the Reverſion to the ſaid Andrews with attornment, who entred, and leaſed to the Plaintiff who entred, and was poſſeſſed, untill by the ſaid Defendants ejected, Modo & forma, pro ut, &c. And upon this Replication, the ſaid five Defendants did demurre in Law. It was argued, That the Plaintiff in his Replication, hath departed from his Declaration; for by his Declaration, he hath ſuppoſed himſelf to be ejected by all the ſix Defendants; and in the Replication he ſaith, That he was poſſeſſed untill by the ſaid five Defendants, who plead in Bar he was ejected; ſo he hath departed from his Declaration in the number of the Ejectors; for he ought to have ſaid, untill he by the ſaid five, and alſo by the ſaid Drake was ejected: as 12 E. 4. 6. in Treſpaſſe upon Entrie upon the Statute of 5 R. 2. againſt J. and E. J. died pendant the Writ, and E. pleaded in Bar, and the Plaintiff did reply and conclude, and ſo was he ſeiſed until the ſaid E. Simul cum dicto: J. named in the Writ, entred upon the Plaintiff, &c. But the opinion of the whole Court was cleer to the contrary; for here in the Caſe at Bar, Drake, by his ſeverall iſſue, which he hath joyned with the Plaintiff, upon Not guilty, is ſevered from the other five Defendants; and then when they plead in Bar, The Plaintiff ought to reply to them without meddling with Drake, who upon his ſeverall Plea, and iſſue joyned upon it, is a ſtranger to them; as if the ſaid five had been the only Defendants: But if he had not replied to Drake, as if Drake had made default, or had dyed after the Writ brought; as in the Caſe before cited of 22 E. 4. there he ought to have replied, as it is objected: So in an Ejectione firmæ of twenty acres, The Defendant, as to ten acres pleads, Not guilty; upon which they are at iſſue; and the Plaintiff replies, and catches, as to the other ten acres, and ſo was he poſſeſſed, untill by the Defendant of the ſaid ten acres he was ejected; this is good without ſpeaking of the other ten acres, upon which the generall iſſue is joyned. And the Court was ready to have given Judgement for the Plaintiff; but they looked upon the Record, and ſeeing that one iſſue in this Action was to be tried between the Plaintiff and the ſaid Drake: And although the Plaintiff offered to releaſe his damages, and the iſſue joyned, and to have Judgement againſt the five Defendants who had demurred; yet the Court was cleer of opinion, that no Judgement ſhould be given upon the ſaid Demurrer, untill the ſaid iſſue was tried; for the Action is an Ejectione firmæ, in which Caſe the poſſeſſion of the land is to be recovered; and it may be, for any thing that appeareth, That Drake, who hath pleaded the generall iſſue, hath Title to the land, &c. But if this

Action

Action had been an Action of Treſpaſſe, there in ſuch caſe, Ut ſupra, upon releaſe of damages, and the iſſue ſoyned, the Plaintiff ſhould have Judgement preſently.

Mich. 26 *Eliz.* In the Kings Bench.

CCLI. Frenches *Caſe.*

IT was preſented before the Coroner, That John French was, Felo de ſe, and that certain goods of the ſaid John French, were in the poſſeſſion of J. S. and this preſentment was certified into the Kings Bench; upon which Proces iſſued forth againſt the ſaid J. S. and continued untill he was Outlawed. And now came J. S. and caſt in his Writ of Error, to reverſe the ſaid Outlawrie, and aſſigned for Error, becauſe that in the preſentment upon which he was Outlawed, there is not any addition given to the ſaid J. S. And at the firſt, it was doubted, If upon that preſentment Proces of Outlawrie did lye: and Ive, one of the chief Clerks of the Crown-Office, ſaid to the Court, That ſuch Proces in ſuch caſe did lye; and that he could ſhew five hundred preſidents to that purpoſe. Another matter was moved upon the Statute of 1 H. 5. 5. of Additions: If this Outlawrie by the Statute aforeſaid, ought to be reverſed for default of Addition; for as much as the ſaid Statute ſpeaks only of Outlawries upon originall Writs in perſonall Actions, Appeals and Indictments: But it was agreed by the whole Court, That as to this purpoſe, the preſentment ſhould be accounted in Law as an Indictment, and afterwards the Outlawrie againſt French was reverſed.

CCLII, *Mich.* 26 *Eliz.* In the Kings Bench.

A Leaſe for thirty years was made by Husband and Wife, if they ſo long ſhould live, and if they dye, &c. That the land ſhould remain to A. their ſon, during the term aforeſaid, And it was holden by Wray, Juſtice, That if the Husband and Wife do dye within the term, that the ſon ſhould have the land, De novo for thirty years: But Gawdy was of opinion, that he ſhall have it for ſo many years, which after their death ſhould be expired.

Mich. 26 *Eliz.* In the Kings Bench.

CCLIII. Coopers *Caſe.*

IN an Ejectione firmæ, The Caſe was, That the Husband and Wife had right to enter into certain lands in the right of the wife; and a Deed of Leaſe for years is written in the name of the Husband and Wife, to one A. for to try the Title; and alſo a Letter of Attorney to B. to enter into the land, and to deliver the ſaid Deed of Leaſe to the ſaid A. in the name of the Husband and Wife, and as well the Letter of Attorney as the ſaid Deed of Leaſe are ſealed by the ſaid Husband and Wife with their ſeals, and entry and delivery is made accordingly; the ſaid A. enters, and upon Ejectment, brings an Ejectione firmæ, and the whole matter aforeſaid was found by ſpeciall Verdict; and the Plaintiff had Judgement to recover, for the ſpeciall matter found by Verdict, i. e. the Deed of Leaſe, and the Letter of Attorney, do maintain the Declaration well enough; and here is a Leaſe made by Husband and Wife, according to that, the Plaintiff hath declared.

Mich.

CCLIV. *Mich.* 29 *Eliz.* In the Kings Bench.

See Godb. 122
4 Leon. 7.

IN an Action of Treſpaſſe for breaking of the Plaintiffs Cloſe, and killing of eighteen Conies there; the Defendant, as to all the Treſpaſſe, but to the killing of the Conies, pleaded, Not guilty: and as to the killing of the ſaid Conies, he ſaid that the place Where, is a Heath, in which he hath common of paſture, and that he found the Conies eating the graſſe there, and he killed them, and carried them away; as it was lawfull for him to do: Cowper, Although Conies be, Feræ naturæ, yet when they are in in-grounds, they are reduced to ſuch a property, that if they be killed or carried away, I ſhall have an Action of treſpaſſe, Vid. 43 E. 3. 24. And if a Deer be hunted by the Plaintiff in a Forreſt, and afterwards in hunting it be driven out of the Forreſt, and the Forreſter doth follow the chaſe, and the Plaintiff kill the Deer in his own grounds, yet the Forreſter may enter into the land of the Plaintiff, and retake the Deer, 12 H. 8. 9. And although the Defendant hath common in the ſoil; yet he cannot meddle with the wood there, nor with the land, nor with the graſſe, otherwiſe then with the feeding of his cattel, for he hath but a faint intereſt; And if he who hath the Freehold in the land, bringeth an Action of treſpaſſe againſt ſuch a commoner for entring into his land, and the Defendant plead, Not guilty, he cannot give in evidence that he hath common there: And it hath been late adjudged, That where commoners preſcribe, That the Lord hath uſed to put in ſuch a paſture but ſo many beaſts, that ſuch a preſcription is a void preſcription: It was argued on the other ſide, That the owner of the ſoil, hath not the true property of the Conies in him, but a kinde of property: And ſee F. N. B. 86. and 87. Quare clauſum fregit, & 20 Cuniculos cepit: Againſt a ſtranger he may have an Action, but not againſt the commonner, becauſe he hath wrong in his common by the feeding of the Conies there; for although he hath not an intereſt in the ſoil, yet he hath an intereſt in the profits of it, and a commoner may diſtrain the beaſts of him who hath not right of common for damage-feaſance, as the books are, 4 H. 7. 3. 15 H. 7. 15. and there the commoner hath not any remedy, if he cannot enter and kill the Conies, for he cannot take them damage-feaſance, nor can impound them; for no Replevin lyeth of them: If the owner of the ſoil plowеth the lands, yet the commoner may put in his cattell, claiming his common, and he may well juſtifie the ſame, becauſe the wrong beginneth in the owner of the ſoil. At another day, the Caſe was moved again; and then it was argued by Coke, and he ſaid, The point is; Whether a commoner having common of paſture, may kill the Conies which are upon the ground; and he argued, That he might not. And firſt, he ſaid, It is to be conſidered, what intereſt he who hath the Freehold may have in ſuch things as are, Feræ naturæ; and then what authority a commoner hath in the ground in which he hath common. As to the firſt point, he ſaid, That although ſuch beaſts are, Feræ naturæ, yet they are reduced to ſuch a property when they are in my ground by reaſon of my poſſeſſion which I then have of them, that I may have an Action of treſpaſſe againſt him who taketh them away: as is the book in, 42 E. 3. If one hath Deer in his Park, and another taketh them away, he may have an Action of Treſpaſſe for the taking of them: See 12 H. 8. If a Keeper or Forreſter follow a Buck which is chaſed out of the Park or Forreſt, although he who hunteth him killeth the Buck in his own ground, yet the Keeper or Forreſter may enter into his ground, and ſeize the Deer, becauſe the property and poſſeſſion of the Deer is yet in them by their purſuit: In 7 H. 6. It is holden, That if a wilde beaſt doth go out of the Park, the owner of the ſoil hath loſt his property in it; but upon the ſaid book, it may be well collected,

that whileſt it remains in the Park, That the owner of the Park hath property in it; for 18 E. 4. 14. It is doubted, whether a man can have property in ſuch things, which are, Feræ naturæ: But in 10 H. 7. 6 it is holden, That an action of Accompt lyeth for things which are, Feræ naturæ: and ſee 14 H. 8. 1. In the Biſhop of Londons Caſe, and 22 H. 6. 59. That as long as ſuch things are in the parties ground, they are in his poſſeſſion, and he hath a property in them; and in an Action brought for them; The Writ ſhall be, Quare damas ſuas cepit, by Newton; And ſee in the Regiſter, fol. 102. where an Action was brought, Quare ducent. Cuniculos ſuos pretii, &c. cepit. It hath been objected on the other ſide, That the Defendant hath common there; To that I anſwer, Admit he hath common, yet he hath not an intereſt in the ſoil; for he cannot meddle with the wood, graſſe, or other profit ariſing of the ſoil, but the interſt which the commoner hath, is onely the feeding of the graſſe with the mouths of his cattell: and if he who hath the Freehold in the ground, doth bring an Action againſt the commoner for entring into his land; If the Defendant pleads, Not guilty, he cannot give in evidence that he hath commmon there; for ſuch evidence will not maintain the iſſue: See 22 Aſſ. A commoner cannot take in the cattell of a ſtranger to agiſt upon the common; and therewith agreeth the book of 12 H. 8. and ſo it hath been adjudged in this Court: Godfrey, contrary: And he argued, That it is lawfull for the commoner to kill the Conies feeding the common: And he agreed, all the caſes which were put by Coke; and further he ſaid, That the owner of the ground had not an abſolute, but a kinde of a qualified property in the Conies; and therefore ſee books of 3 H. 6. and F. N. B. If a Writ of Treſpaſſe be brought, Quare Cuniculas ſuas cepit, the Writ ſhall abate; and yet he hath a kinde of property, or a poſſeſſion rather in them. I grant that againſt a ſtranger the Plaintiff might have his Action for killing of his Conies, but not againſt the commoner, becauſe the commoner hath a wrong done unto him by the Conies, eating of his common, and therefore he may kill them; and although the commoner may not meddle with the land, becauſe he hath not an intereſt in it; yet in ſome caſes he may meddle with the profits of it, and he may diſtrain the cattel of a ſtranger there, damage-feaſance; as the book is in 15 H. 7. I grant that it is not lawfull for Tenant for life to kill the Conies of him who hath free-warren in the land. For if a man bringeth an Action of Treſpaſſe, Quare warronem ſuum intravit, & Cuniculos ſuos cepit: It is no Plea for the Defendant to ſay, That it is his Freehold. See 43 E. 3. accordingly. In L. 5 E. 4. In Treſpaſſe, Quare clauſum fregit, & Cuniculos ſuos cepit: The Defendant ſaid, That the Plaintiff made a Leaſe at will to J. S. of the land, and that he, as ſervant to the ſaid J. S. did kill the Conies there, and it was holden a good Plea; and yet it is there ſaid, That by the grant of the land, the Conies do not paſſe; but the reaſon of the book might be, as I conceive, becauſe the feeding of the land with the Conies, is to his damage, and therefore, that he might juſtifie the killing of them: and ſo are the books of 2 H. 7. and 4 E. 4. If I have common of paſture in lands, and the Tenant ploweth up the land, I ſhall have an action upon the Caſe on the nature of a Quod permittat. And in 9 E. 4 If one hath lands adjoyning to my land, and levyeth a Nuſance, I may enter upon the land, and abate the Nuſance: So if a man taketh my goods and carrieth them unto his own lands, I may enter therein, and ſeize my goods: So if a Tenant of the Freehold plowes the land and ſoweth it with corn, the commoner may put in his cattell, and therewith eat the corn growing upon the land: So if a man do falſly impriſon me, and put me in his houſe, I may juſtifie the breaking open of his houſe to get forth. In 21 H. 6. All the Inhabitants of a Town do preſcribe to have common in ſuch a field every year after Harveſt, If one particular man,

man who hath Freehold land, with the ſaid field ſowed, will not within convenient time gather in his corn, but ſuffer the ſame to continue there of purpoſe to bar the Inhabitants of their common, The Inhabitants of the Town may put in their cattell into the ſaid field, and therewith eat his corn, and he ſhall have no remedy for their ſo doing; and he put the Queſtion, What remedy the commoner ſhould have for the eating and deſtroying of his common which his cattel ſhould have, for that he can neither diſtrain them damage-feaſance, nor impound them? for a Replevin doth not lye of Conies; and therefore he ſaid, he hath no other remedy but to kill and deſtroy the Conies. See 19 E. 3. and F. N. B. If the Lord doth ſurcharge the common, the commoner may have an Action againſt him; but in this Caſe he can have no Action: Gawdy, Juſtice, The commoner cannot deſtroy or kill the Conies, becauſe he may have other remedy: Shute, Juſtice, A commoner cannot take or diſtrain the beaſts of the Tenant of the land for damage-feaſance, therefore he cannot take or deſtroy the Conies which are upon the land, becauſe he may have other remedy; for he may have an Action upon the Caſe, or an Aſſize for putting of the Conies upon the land, if the owner of the land leave not ſufficient common for the cattel of the commoner; and afterwards Judgement was given for the Plaintiff.

Hill. 29 *Eliz.* In the Exchequer Chamber.

CCLV. Manwood *and* Burſtons *Caſe.*

MAnwood, chief Baron of the Exchequer, brought an Action upon the Caſe againſt Burſton, and declared, That whereas Agnes Griffin was poſſeſſed of the third part of the Manor and Rectory of Higham for term of years, by Demiſe of the Maſter and Fellows of Saint Johns Colledge in Cambridge, made to Worthington; and whereas John Sutton was poſſeſſed of another third part of the ſaid Manor and Rectory by the ſame Demiſe; and whereas John Palmer was poſſeſſed of another third part of the ſaid Manor and Rectory for the ſame term, The ſaid Burſton, 20 Aprilis, 28 Eliz. in conſideration that the ſaid Plaintiff, Obtinuiſſet de prædicta Agnet. totum terminum ſuum aſſurari ipſis Rogero Manwood, and the Defendant; (ſcil.) Unam medietatem dictæ tertiæ partis dicto Rogero, & alteram medietatem, unto the ſaid Defendant, apud London, in ſuch a Ward, Aſſumpſit eidem querent. Quod ſi idem querens procuraret dictam Johannem Palmer, to aſſent and ſell his third part, the one moyetié to the Plaintiff, and the other to the Defendant for 320 l. That the Defendant, ſolveret æquam portionem inde, (ſcil.) 160 l. And licet, the Plaintiff had procured the ſaid Palmer 22 Aprilis, an. ſupradict. to aſſent and ſell the third part for 320 l. to be paid the 3 Maii the ſame year, and the reſt at another day; and licet, the ſaid Plaintiff was ready to pay his part, and offered the ſame, (ſcil.) 160 l. And licet, the ſaid Palmer was ready, and offered to ſell and convey his term aforeſaid, &c. Yet the ſaid Defendant, ſolvere æquam partem ſuam, (ſcil.) 160 l. Non fuit paratus ſed recuſavit, for which the ſaid Palmer, Noluit vendere, his part or intereſt, by which the Plaintiff was damnified, &c. The Defendant pleaded, That after the Aſſumpſit, the Plaintiff did diſcharge the Defendant of the ſaid promiſe; upon which they were at iſſue; and it was found for the Plaintiff, who had Judgement to recover. Upon which Burſton brought a Writ of Error in the Exchequer Chamber. And divers errors were aſſigned: 1 It is not ſhewed at what time the term of Agnes Griffin did begin: 2 The Leaſe of the Colledge is not ſhewed to be by writing: 3 It is not ſhewed for what term Palmer was poſſeſſed: 4 It is not ſhewed at what time the Plaintiff had obtained

the part of Agnes: 5 The Aſſumpſit is laid to be, Apud London, in Warda de Farrington extra, and ſo apud London; and extra London, which is repugnant: 6 The Plaintiff hath declared, That the College had Leaſed to Worthington; and that A. and B. were poſſeſſed, Virtute dimiſſionis prædict. To theſe Erroꝛs, the chief Baron put in his anſwer in writing: As to the two firſt, they are in the recitall, and but matter of induction to the conſideration, and not traverſable, noꝛ otherwiſe materiall to be alledged foꝛ the commencement of them, oꝛ foꝛ the Rent, but onely the ending of the term to come is ſufficient: As in an Action upon the Caſe; That whereas the Defendant was indebted unto the Plaintiff, in divers ſummes of money, amounting to 40l. the Defendant, in conſideration thereof, pꝛomiſed, &c. the Plaintiff needs not to ſhew any certainty of the Contract, oꝛ other circumſtance, how, oꝛ in what manner the debt did accrue, oꝛ begin: As in an Action upon the Caſe, The Plaintiff declares, That whereas he hath married the daughter of the Defendant, the Defendant in conſideration that the Plaintiff would aſſure to his ſaid wife, land to the yearly value of 20l. foꝛ her joynture, as ſhall be adviſed by the Councell of the Defendant, That he will pay unto the Plaintiff 100l. And licet, the Plaintiff hath made ſuch a joynture of land in S. unto ſuch yearly value foꝛ the uſe of his wife, by the advice of the Councel of the Defendant, &c. Here the Plaintiff needs not to ſhew what manner of Conveyance, oꝛ Aſſurance was adviſed; foꝛ it is ſufficient, if the conſideration recited be pꝛoved in evidence with the circumſtances; but in pleading, it is not traverſable, noꝛ iſſuable. The third Erroꝛ is miſtaken: The fourth is anſwered as the two firſt; foꝛ it is but matter of recitall; and the conſideration paſt and executed before the Aſſumpſit, and not at the time of the Aſſumpſit, and but an Induction oꝛ Conveyance to the Pꝛomiſe: The fifth matter is miſconſtrued; foꝛ there are two Wards of Farrington, infra, & extra: infra the walls, and extra the walls, and yet both, apud London, and extra is to be referred to Farrington, and not to London; and there ought to be made a point after extra; as Farrington extra; London. The ſixth is miſtaken; foꝛ there is no Erroꝛ in that: foꝛ the Aſſignee is poſſeſſed, Virtute dimiſſionis; foꝛ the oꝛiginall Leaſe is the vertue and ſtrength of the poſſeſſion of the Aſſignee: But if theſe exceptions had been materiall; yet foꝛ as much as the iſſue is not upon the Aſſumpſit, foꝛ that is confeſſed by the Defendant, and by that the recitall, conſideration, and all the ſpeciall matters confeſſed to be true: But the Defendant hath pleaded a new matter after the Aſſumpſit, a diſcharge of the Aſſumpſit, which diſcharge is found againſt him, all the particulars in which the Erroꝛs are aſſigned, are out of the book; and now the matter of diſcharge is onely materiall: As in debt foꝛ arrerages of Rent reſerved, a Leaſe foꝛ years, If the time and place of the making of the Leaſe be not ſet foꝛth in the Declaration, the Declaration is not good. But if the Defendant plead a Collaterall matter; as releaſe of the arrerages, oꝛ other ſuch matter, now all the imperfections of the Declaration are waved, &c. At another day the matter was argued again. There are three manner of conſiderations upon which an Aſſumpſit may be grounded: 1 A debt pꝛecedent: 2 Where he to whom ſuch a pꝛomiſe is made, is damnified by doing any thing, oꝛ ſpends his labour at the inſtance of the Pꝛomiſer, although no benefit cometh to the Pꝛomiſer: as I agree with a Surgeon to cure a pooꝛ man (who is a ſtranger unto me) of a ſoꝛe, who doth it accoꝛdingly, he ſhall have an Action: 3 Oꝛ there is a pꝛeſent conſideration, &c. The firſt Exception was, becauſe the Aſſumpſit being layd to pꝛocure ſuch a Leaſe which another had, i. e. one A. it is not ſhewed in the Declaration, in facto, That A. had ſuch a Leaſe, and if he had not any ſuch Leaſe, then there cannot be any conſideration to pꝛocure it: Foꝛ, Ex nihilo, nihil fit:

Secondly,

Secondly, the Declaration is, That A. was poſſeſſed of a Leaſe for years, to be ended and determined in Ann. 1606. without ſhewing any begining of it; and although that Leaſe be but matter of Conveyance and inducement, yet, becauſe it is the ground of the Action, it ought to be certainly and ſufficiently ſet forth. Thirdly, the Leaſe to be procured, is laid to be made by a Colledge in Cambridge, and it is not ſhewed for what term of years, i. e. for 21 years or under; for if it be above, then ſuch Leaſe is void. Fourthly, It is not laid in the Declaration, that the Leaſe was by writing, and then void; for a Colledge cannot make a Leaſe without writing, and it ſhall be intended it was made without Deed, becauſe it is not laid to be by Deed: As if a Corporation makes a Leaſe for life, and afterwards granteth the Reverſion for years, he that will entitle himſelf to the ſaid Reverſion, ought to ſay in pleading, That he made the Leaſe for life by Deed, although the Leaſe for life in ſuch caſe be but matter of Conveyance: Fifthly, It is not laid in the Declaration, That the Leaſe to be aſſured was in eſſe, and had continuance at the time it was to be aſſured; for although it be laid to be in eſſe, at the time of the promiſe, yet being a particular intereſt, it ſhall not be intended to continue, if it be not ſpecially ſhewed: As 10 H. 7. 26. Sixthly, Here the Plaintiff hath not Cauſe of Action, but Palmer, for the Aſſumpſit, upon which the Action is grounded, the money is to be payable to Palmer, not to the Plaintiff, 2 E. 4. 5. My Bailiff lets my land to Farm, rendering Rent, he ſhall not have an Action for the Rent, but I my ſelf, in whoſe right he Leaſed: 25 Eliz. It was the Caſe of one Crewe, I promiſed unto J. S. That in conſideration that he will make unto me a Leaſe for years of ſuch lands, I will aſſigne the ſame to his ſervant. If he will not make the Leaſe, not J. S. but his ſervant ſhall have Action upon the promiſe: and although the Defendant hath pleaded collateral matter, by which the promiſe is confeſſed, yet the ſame doth not amend the matter; for if the Declaration be inſufficient, the Court, ex Officio, ought to ſtay Judgement: As 6 H. 7. 10. In treſpaſſe, the Defendant pleads, That there was an Accord betwixt them, that in ſatisfaction of the ſaid treſpaſſe, he ſhould pay to the Plaintiff ſuch a ſumme, and make two windows, the which ſumme he had paid before the day, without ſpeaking any thing of the windows, The Plaintiff pleaded, No ſuch Accord and it was found for the Plaintiff; and although the Plaintiff doth admit the Plea as good, yet the Court, ex Officio, ſhall ſtay the Judgement: See the Book of Entries, 4. A Carpenter brought an Action upon the Caſe, and declared generally upon the Aſſumpſit, Pro diverſis rebus vocat. Carpenters wares, & pro diverſis laboribus per querent. at the inſtance of the Defendant, in arte lignaria, &c. and holden good without any particulars. It was adjorned.

25 *Eliz.* Crews Caſe.

Mich. 29 *Eliz.* In the Exchequer-Chamber.

CCLVI. Paynes *Caſe*.

A Writ of Error was brought by Payne, Treaſurer of the Records of the Kings Bench, in the Exchequer-Chamber, upon a Judgement given in the Court of Exchequer, upon an aſſignment of a Leaſe for years, by the Earl of Oxford, to the Queen: One Error is aſſigned, That whereas the iſſue was joyned upon intruſion, in the taking of the profits, and ſo two matters put in iſſue; The Jury have found Payne guilty of Intruſion; but have ſaid nothing of the taking of the profits, and ſo the Verdict doth not fully meet with the iſſue: But the great matter of the Caſe was upon this point; The Information is, That the Aſſignement to the Queen was

16 Maii,

16 Maii, the Intruſion, 17 Maii, the Inrolment of the Deed of Aſſignment, the 18 of May. So it appeareth upon the Record, That the intruſion is ſuppoſed to be done before the Queen had any intereſt in the lands, in which the intruſion is ſuppoſed, for nothing was in the Queen before the Inrolment; For the Queen is a Corporation of State, of ſuch prerogative and excellency, that ſhe cannot give or take an intereſt in any lands without matter of Record; and this Leaſe is a Chattell Reall, and intereſt in lands: See as to the inrolment, 1 H. 7. 30, 31. 5 E. 4. 7. 7 E. 4 16. But I grant, that if the Leſſee for years be outlawed, the Leaſe ſhall be in the King, without Office, for the Outlawrie it ſelf is a ſufficient Record to entitle the King to it: If the Queen makes a Leaſe for years of land, rendring Rent, with clauſe, That if the Rent be behinde, that the Leaſe ſhall ceaſe if the Rent be not paid, it was agreed here in Sir Moile Finches Caſe, That the Leſſee continuing his poſſeſſion, ſhall not be accounted an intruder before Office thereof found; but he ſhall be accountant to the Queen for the profits, as Bailiff of his own wrong. But here we are charged with intruſion: It hath been doubted; if perſonall things be in the King without Office, 37 H. 6. but now it is cleer that it is: as 35 E. 3. Br. Prærogat. 113. The Villeyn of the King purchaſeth goods, the property thereof is in the King without ſeizure, and ſo of all perſonall Chattels, becauſe tranſitory, 1 H. 7. 17. 4 H. 7. 1. 39 H. 6. 26. And here it appeareth upon Record, that this Deed of Aſſignment, was delivered to Baron Clark, the 16 of May, at Weſtminſter: and to that we ſay, That the ſaid day was, Dies Aſcentionis, & ſic non juridicus, and ſo no Court there then holden, and then the ſaid Deed was not delivered in Court of Record, and then not delivered unto him as a Judge, but as a private perſon, although it was delivered to the uſe of the Queen: But in 37 H. 6. there is ſome opinion, That if ſuch a Deed be delivered in Court to one of the Barons, or be put into the Kings Cofers, that then it is a Record. Atkinſon contrary, And as to the firſt Exception; It is to be known, That in every Plea, where a contempt is laid to the charge of the Defendant; he ought firſt to excuſe, or cleer the contempt: and therefore here, the Exordium of the Plea is, Quoad venire vi & armis, & quicquid eſt in contemptum Dominæ Reginæ, nec non de tota ulteriore tranſgreſſione & contemptu per ipſos fieri ſuppoſit. ipſe in nullo eſt inde culpabilis: and afterwards plead over, and ſo it is in an Action of treſpaſſe: and alſo upon the Statute of 8 H. 6. of Forcible entry; and here the iſſue upon the contempt follows the other iſſue: for if the one iſſue be found againſt the Defendant, ſo alſo is the other. As to the other point, I grant, That a Corporation cannot take, or ſpeak without writing: and the King being the Corporation of Corporations, and the chief of Corporations, and who makes all Corporations, cannot take without a writing of as high a nature: (Scil.) Record. And we have a Record here, (as it is granted of the other ſide) being inrolled the 18 of May, which was delivered the 16 of May; and then Payne, upon the whole matter, was the 17 of May an intruder, by relation of the Deed to the time of the firſt deliverie; And an intruder by his entrie cannot gain any thing out of the Queen; and therefore the information upon the intruſion is, diverſis diebus, & vicibus intruſit: although it be but one continued poſſeſſion; and therefore at every inſtant, during his poſſeſſion, he is an intruder: As unto the deliverie of the Deed of Aſſignment upon the day of the Aſcention, which is not dies juridicus, the ſame is not materiall, as is 12 E. 4. 8. by Pigot: If the day of the Return of a Writ, i. e. quarto die falls out in die Dominica, yet it is good enough, although no Court can then be holden, but the day following, and the Plea is not diſcontinued; And this delivery of the Deed of Aſſignment, might be out of Term, and therefore at any day within the Term, which is not, dies Juridicus, but contrary, of a thing which is neceſſarily to be done within the Term: as in the Caſe be-

Sir Moile Finches *Caſe.*

tween

tween Fiſh and Brocket, of Proclamations made upon a Fine; for a man may acknowledge a Recognizance, or a Deed to be inrolled in the time of Vacation,&c. Tanfield: As to the intereſt, the inrolment hath relation, but not as to the profits; for Payne cannot be an intruder, the 17 of May by any relation. Popham, the Queens Attorney, When an information upon intruſion and taking of the profits is here exhibited, the Defendant ought to juſtifie his entrie; and if the entry be found againſt him, ſo as his entry is an intruſion, then the unlawfull taking of the profits is found alſo; and he ſaid, That the Deed acknowledged, and delivered to the Baron, is a Record, although it be not incolled, be the acknowledgement thereof either out of Court, or in Court: If an information upon a Penall Statute be exhibited unto a Baron of the Exchequer out of Court, and afterwards another informer exhibits another information upon the ſame Statute for the ſame offence againſt the ſame perſon, and that is brought into the Court before the firſt, the firſt information ſhall be preferred, and the Defendant ſhall anſwer to that, and not to the other; and for the exhibiting of it in Court, or out of Court, it is not materiall: And the Aſſignment, when it is inrolled, hath relation unto the acknowledgement of it: A Reverſion is granted to one for life, the Remainder to the King, the particular Tenant Attorns, the Remainder is not in the King by the Attorment, but if the Deed be afterwards inrolled, it ſhall be ſaid to be in the King from the time of the Attornment, and the King ſhall have the benefit of the whole mean profits from the time of the Attornment: A Leaſe for years is made by the King reſerving Rent, with clauſe of diſtreſſe; That if the Rent be not paid, that the Leaſe ſhall be void, the Rent is not paid, ten years after an Office is found, the King ſhall be anſwered all the profits from the time of the default of payment of the Rent; and although no intruſion can be laid on the information, 17 Maii, yet it ſhall be for the 18 day of May. Coke, The Judgement for the Queen upon an information of the intruſion, Quod defend. de intruſione, tranſgreſſione, & contemptu prædict. convincantur, &c. and afterwards a Commiſſion ſhall iſſue forth, to enquire of the mean profits, and there the Defendant may ſhew the matter for to mitigate the damages; and if the intruſion be at any time in the information, it is well enough to have Judgement; and in our Caſe, the continuance is laid 18 Maii: Egerton, Sollicitor Generall, The Record doth warrant the Judgement given upon it; for poſſeſſion laid in the Queen, is ſufficient to maintain this information; and here Payne doth not anſwer to the title of the Queen, but traverſeth the intruſion, and therefore being found an intruder by Verdict, Judgement ought to be given upon it, for the Jury have found the intruſion generally, and not ſpecially, the 17 of May, and that cannot be aſſigned for Error; for it is part of the Verdict of which Error doth not lye, but attaint: for if any Error was, the ſame was in the Jury and not in the Court; which Manwood granted: Tanfield, As unto the Caſe of continuance of an intruſion, it is clear, that every continuance ought to have a begining; for a thing which hath not a begining, cannot be continued; and here is not any begining; for the begining which is laid in the information, is pretended to be, 17 Maii, and that cannot be for the Cauſe aforeſaid: Popham, If an information be brought of intruſion, as appears in many Memorandums in the Exchequer, where, in truth, there is not any Record to prove it, and the Jury finde the intruſion: Will you have a Writ of Error upon it? And every continuance of intruſion, is intruſion: Anderſon, The ſame matter had been good evidence, Sed non habet locum hic.

Trin.

Trin. 29 *Eliz.* In the Common Pleas. *Int. Hil. Rot.* 1544.

CCLVII. Beale *and* Langleys *Caſe.*

JOhn Beale was Plaintiff in a Replevin, againſt Robert Langley and Roger Hill: The Caſe was, That Henry, Earl of Arundel was ſeiſed of the Mannor of Bury in his Demeſne as of Fee, whereof the place in which was parcell demiſed and demiſable, according to the cuſtom of the ſaid Mannor by Copy in Fee, whereof Langley was a Copiholder in Fee, &c. and the ſaid Earl ſo ſeiſed, enfeoffed divers perſons of the ſaid Mannor unto the uſe of himſelf for life, and afterwards to the uſe of the Lord Lumley, and Elizabeth his wife, daughter of the ſaid Earl, and the heirs of their two bodies begotten, who made a Leaſe of the ſaid Cuſtomary lands by Indenture unto the Plaintiff for 100 years; and the queſtion was, If by this Leaſe, the lands be ſo ſevered from the Mannor, that the Copihold is extinct: Walmeſley took exception to the pleading; for that Langley pleads, That the cuſtom within the Mannor is, That if any Copiholder ſeiſed of Cuſtomary lands of the ſaid Mannor dyeth thereof ſeiſed, having many ſons, That the youngeſt ſon ſhall inherit; and he ſheweth, That the Lord of the ſaid Mannor granted to his father and his mother the ſaid cuſtomary lands by Copie, to have to his ſaid father and mother, and the heirs of his father, &c. And that his father dyed, and that his mother ſurvived him and dyed, and he as youngeſt ſon, according to the cuſtome, entred, and he ſaid, That this cuſtome, ſet forth by the Defendant, doth not maintain his entry; For the cuſtom intendeth but a generall and immediate deſcent upon a Copie made unto a man, and to his heirs, but ſuch is not the deſcent here, for the wife ſurviveth; during whoſe life, the heir cannot enter; nor is there here ſuch Eſtate in the father of the Defendant unto whom the cuſtom ſet forth in the Avowrie can extend: For the cuſtom is alledged, Where a Copiholder hath a Copihold Eſtate to him and his heirs, and here, for the Title of the Defendant, That a cuſtomary Eſtate was granted to the father and the mother, and the heirs of the father, ſo as this Eſtate is not within the Letter of the cuſtom; And to that purpoſe he cited the Caſe of Sir John Savage, late adjudged, Where one entitled himſelf to a Copihold in this manner; That within the Mannor, there is ſuch a cuſtom, That if one taketh to wife any cuſtomary Tenant of the ſaid Mannor in Fee, and hath iſſue by her, he, if he over-live ſuch wife, ſhould be Tenant by the Curteſie, and the Caſe in truth was, That he married a woman, who at the time of the marriage, had not any Copihold, but afterwards, during the Coverture, a Copihold deſcended to her. In that Caſe, it was holden, That no Tenancie by the Curteſie did accrue by that cuſtom, which did not extend, but where the wife is a Copiholder at the marriage; and a cuſtom ſhall be in conſtruction taken ſtrictly, and ſhall not be extended beyond the words of it. And as to the matter in Law, he ſaid, That by this Leaſe, the cuſtom was gone, and then by conſequence, the cuſtomary Tenancie, as to that land, is determined; for the Eſtate of the Copiholder is, Secundum conſuetudinem Manerii, ad voluntatem Dom. And now, by the Leaſe, Langley cannot hold, Secundum conſuetudinem Manerii; for now the ſervices reſerved upon the Copy, and the advantages of Waſte, and other forfeitures, are extinct; ſo that if notwithſtanding the Leaſe, the cuſtomary intereſt ſhould endure, then ſuch a Copiholder ſhould hold this land, diſcharged of all ſervices, &c. in better Eſtate then any Freeholder at the Common Law, and becauſe the ſervices in Law are diſcharged, and cannot be recovered, for that cauſe the cuſtomary intereſt

Sir John Savages *Caſe.* Ante 109.

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is determined: For the Caſe is, 7 E. 4. 19. by Danby, That the Copiholder ſhall have remedy againſt his Lord, if he put him out, for he payes a Fine when he enters; but here, during this Leaſe, no Fine can be payd upon any deſcent, &c. and the Fine is the cauſe, for which the Copiholder ſhall maintain his poſſeſſion againſt the Lord: But here no deſcent or ſurrender can be preſented; for there is not any Tenant who can do it: See 21 E. 4. 80. by Brian, As long as the Copiholder payeth unto his Lord the cuſtoms and ſervices, If the Lord putteth him out, he ſhall have an Action of Treſpaſſe: 42 E. 3. 25. If the Copiholder will not do his ſervices, the Lord ſhall ſeize the lands: An he reſembled this Caſe, to the caſe where the King grants lands, probis hominibus de D. the ſame is a good Grant, and that onely in reſpect of the Rent, and for the reaſon of that, it is a good Corporation: But if the King releaſeth the Rent, the Corporation is diſſolved, and the Grant is become void: Fenner, Serjeant, contrary; and he ſaid, That by this Leaſe, being the act of the Lord himſelf, the cuſtomary intereſt is not determined, &c. an the whole Court was of cleer opinion with Fenner, That the Copihold did remain, for otherwiſe, by ſuch practices of the Lords, all the Copiholders in England might be defeated; and if any prejudice be grown to the Lord by this act, it is of his own doing, and againſt his own act he ſhall not be relieved: And by Periam, Juſtice, The Lord by his act, i. e. the making of the Leaſe, hat deſtroyed his Seignory, and loſt the ſervices, as to this land: And Windham, Juſtice, ſaid, That the Lord himſelf had deſtroyed the cuſtom, as to the ſervices, but not as to the cuſtomary intereſt of the Tenant; but the Lord Anderſon was of opinion, That the Rents and ſervices do remain; and if the Copyholder, after ſuch Leaſe committeth Waſt, that it is a forfeiture to the Lord; and that will fall in evidence upon a triall, although ſuch Waſt cannot be found by an ordinary preſentment: and the ſame Law which alloweth the Copiholder his Copihold intereſt againſt this Leaſe, will allow unto the Lord his Rents and ſervices: and he ſaid, That the Lord ſhall have the Rents and ſervices, and not the Leſſee, Quod mirum, againſt his own Leaſe: See 33 Eliz. between Murrel and Smith now reported by the Lord Coke in his 4 Report. fol. 20.

Trin. 29 *Eliz.* In the Common Pleas

CCLVIII. Ruſſel *and* Brokers *Caſe*.

RUſſel brought Treſpaſſe againſt Broker, for cutting down of four Okes. The Defendant pleaded, That the place where, &c. and that he is ſeiſed of a Meſſuage in D. And that he, and all thoſe whoſe Eſtate he hath, &c. Habere conſueverunt rationabile eſtoverium ſuum, for fewell, ad libitum ſuum capiendum in boſcis, ſubboſcis, & arboribus, ibidem creſcentibus: and that, in quolibet tempore anni, but in fawning time; The Plaintiff by Replication, ſaid, That the place where, is within the Forreſt of, &c. and that the Defendant, and all thoſe whoſe Eſtate, &c. Habere conſueverunt rationabile eſtoverium ſuum de boſcis, *&c.* per liberationem Forreſtarii, vel ejus Deputati, pro ut boſcus pati poteſt, & non ad exigentiam petentis: And upon that Replication, the Defendant did demurre in Law: and the opinion of the whole Court was, That Judgement ſhould be given againſt the Plaintiff; for if he ſhould ouſt the Defendant of his preſcription by the Law of the Forreſt, he ought to have pleaded the Law of the Forreſt in ſuch caſe; viz. Lex Forreſtæ eſt, &c. for the Law of the Forreſt is not the common Law of the Land, and we are not bounden to take notice of it, but it ought to be pleaded, or otherwiſe the Plaintiff ought to have traverſed the preſcription of the Defendant, for here are two preſcriptions;

one pleaded by the Defendant by way of Barre, the other ſet forth by the Plaintiff in his Repſication without any traverſe of that which is alledged in the Bar, which cannot be good; but if the Plaintiff had ſhewed in his Replication, Lex Forreſtæ talis eſt, &c. then the preſcription of the Defendant had been anſwered without any more; for none can preſcribe againſt a Statute. Exception was taken to the Bar, becauſe the Defendant had juſtified the cutting down of Oaks, without alledging, that there was not any underwood, but the Exception was not allowed; for he hath his choice, ad libitum ſuum. Another Exception was taken, becauſe he hath not ſhewed, that at the time of the cutting, it was not fawning time; for at the fawning time his preſcription did not extend to it and that was holden a good materiall exception; but becauſe the Plaintiff had replied; and upon this Replication, the Defendant demurred: the Court would not reſort to the Bar, but gave Judgement upon the Replication againſt the Plaintiff.

CCLIX. *Trin.* 29 *Eliz.* In the Common pleas.

A Black-Smith of South-Mims, in the County of Middleſex, took a Bond of another Black-Smith of the ſame Town, that he ſhould not exerciſe his Trade or Art of a Black-Smith within the ſame Town, nor within a certain precinct of it; and upon that Obligation, the Obligee brought an Action of Debt in the Common Pleas, depending which, the Obligor complained to the Juſtices of Peace of the ſaid County upon the matter againſt the Obligee, upon which the matter being found by examination, the Juſtices committed the Obligee to priſon; and now, upon the whole matter, Puckering, Serjeant, prayed a Habeas Corpus for the ſaid Obligee to the Sheriff of Middleſex, and it was granted: and Fleetwood, Recorder of London, being at the Bar, the Court told him openly of this matter, That by the Laws, Juſtices of Peace have not Conuſance of ſuch offences, nor could meddle with them; for their power is limited by their commiſſion and the Statutes; and the Recorder did much relie upon the opinion of Hull, 2 H. 5. 5. But by the cleer opinion of the whole Court, although this Court, being a high Court, might puniſh ſuch offences appearing before them on Record, yet it did not follow, That the Juſtices of Peace might ſo do: But as to the Bond, the Court was cleer of opinion, that it was void, becauſe it was againſt Law.

Shyn. 133.

CCLX. *Trin.* 29 *Eliz.* In the Common Pleas.

A Juſticies iſſued forth to the Sheriff of H. for the Debt of 40 l. and the Plea was determined before the Under-Sheriff in the abſence of the Sheriff, and it was now moved by Puckering, Serjeant, If a Writ of Error, or a Writ of falſe Judgement did lie in that Caſe: And firſt, the opinion of the Juſtices was, That the Sheriff himſelf in his perſon ought to hold Plea of a Juſticies; and if he maketh a Precept or Deputation to another, the ſame is meerly void: 34 H. 6. 48. And ſee the ſaid Caſe abridged; Fitz. Bar. 161. and it was ſaid, That a Juſticies is not an Originall Writ, but a Commiſſion to the Sheriff, to hold Plea, ultra 40 s. and upon a Judgment given upon a Juſticies, a Writ of falſe Judgement lieth, and not a Writ of Error: See for that, 7 E. 4. 23. And it was the opinion of Anderſon, chief Juſtice, That ſuch Judgement is utterly void, and Coram non Judice.

Trin.

CCLXI. *Trin.* 29 *Eliz.* In the Common Pleas.

NOte, by Anderſon, chief Juſtice, That if Ceſtuy que uſe, after the Statute of 1 R. 3. Leaſeth for years, and afterwards the Feoffees releaſe unto the Leſſee and his heirs, having notice of the Uſe, that this releaſe is unto the firſt Uſe: But where the Feoffees are diſſeiſed, and they releaſe unto the Diſſeiſor, although they have notice of the Uſe, the ſame is to the Uſe of the Diſſeiſor, and that was the Caſe of the Lord Compton; and that no Subpæna lieth againſt ſuch a Diſſeiſor: See 11 E. 4. 8.

Hill. 31 *Eliz.* In the Kings Bench.

CCLXII. Hampers *Caſe.*

HAmper was Indicted upon the Statute of 5 Eliz. of Perjury, and in the body of the Indictment, The Record was, That he, Falſa deceptive depoſuit; whereas the Statute is, Wilfully; and although in the perclose of the Indictment, the concluſion is, Et ſic commiſit voluntarium perjurium: Yet the opinion of the Court was, that the ſame doth not help the matter; and for that cauſe, the party was diſcharged: For, contra formam Statuti, will not help the matter, nor ſupply it; and yet it was moved and urged, That contra formam Statuti would help it; and it was holden in this Caſe, That if a witneſſe doth depoſe falſly, but the Jury doth not give credit to it, nor give their Verdict againſt his oath, although the party grieved cannot ſue him; yet he may be puniſhed at the Kings ſuit.

Hill. 31 *Eliz.* In the Kings Bench.

CCLXIII. Moultons *Caſe.*

IT was moved by Coke, That one Robert Moulton, Tenant in tail, having iſſue two ſons, Robert and John, dyed ſeiſed, and that Robert his ſon and heir, levyed a Fine thereof, and afterwards levyed another Fine, and dyed without iſſue; and John brought two ſeverall Writs of Error to reverſe both the Fines; and the Tenant, to the Writ of Error, brought upon the firſt Fine, pleaded the ſecond Fine in Bar of it; and in Bar upon a Writ of Error brought upon the ſecond Fine, he pleaded the firſt Fine; and the Court adviſed him to plead, That the Fine pleaded in Bar was erronious: 7 H. 4 107 where a man is to annul an Outlawrie, his perſon ſhall not be diſabled by any other Outlawrie.

Trin. 30 *Eliz.* In the Common Pleas.

CCLXIV. Broccus *Caſe.*

BRoccus, Lord of a Manor, covenanted with his Copiholder, to aſſure to him and his heirs, the Freehold and Inheritance of the Copihold, and the Copiholder in conſideration of the ſame performed, did covenant to pay ſuch a ſumme. And it was the opinion of the whole Court, That the Copiholder is not tied to pay the money before the Aſſurance made, and the Covenant performed: But if the words had been in conſideration

of the ſaid Covenant to be perfozmed, then he had been bound to pay the money preſently, and he ſhould have his remedy by Covenant.

Trin. 30 *Eliz.* In the Kings Bench.

CCLXV. Foſters *Caſe.*

NOte, It was ſaid, and holden by the whole Court in this Caſe, That in Debt brought againſt Executozs, If the Defendants plead, That the Teſtatoz was bound in a Recognizance, in ſuch a ſumme, beyond which they have not any thing in their hands; That it is a good Replication, to ſay, That the Recognizance was entred into foz perfozmance of Covenants contained in certain Indentures, of which Covenants none are yet brzoken.

Trin. 30 *Eliz.* In the Kings Bench.

CCLXVI. Partridges *Caſe.*

A Quo Warranto was brought againſt Partridge, in which Caſe, It was holden by all the Juſtices, That a man may preſcribe to hold a Leet oftener then twice in one year, and at other dayes then are ſet down in the Statute of Magna Charta, cap. 35. becauſe the ſaid Statute is in the Affirmative; But Popham ſaid, That one cannot preſcribe againſt a Statute, See foz the ſame, Book of Entries, 13 E. 3. Leet 12. and he ſaid, That the want of a Tunbrel and Pillorie, is a good cauſe of fozfeiture of the Liberty: which Coke denyed. And it was further moved by Popham, That if a generall pardon be granted with generall exceptions in it, he that will take advantage of the ſame, ought to plead it, and ſhew that he is not any perſon excepted; foz otherwiſe the Judges cannot allow him the benefit of it, becauſe they do not know if he be a perſon excepted oz not; But if there were ſpeciall perſons excepted by name, and none other excepted, but onely thoſe perſons, there the party needs not to plead it, foz the Court may diſcern J. B. from J. D. See 8 E. 3. 7. and 26 H. 8. 7. If a man commits Felony, and alſo Treaſon, and afterwards comes a generall pardon foz the Felony, but Treaſon is excepted, and the party is arraigned of Felony: by Coke, he ſhall have the benefit of the pardon; but Popham contrary, foz he is diſabled by the Treaſon. And it was agreed by the whole Court, That in a Quo Warranto, It is not ſufficient foz the Defendant to ſay, That ſuch a Subject hath lawfull intereſt to hold a Leet, without making Title to himſelf; foz the Writ is, Quo Warranto he claims, &c: And afterwards Judgement was given foz the Queen.

Trin. 30 *Eliz.* In the Kings Bench.

CCLXVII. Wiggen *and* Arſcots *Caſe.*

IN a Prohibition, the ſurmiſe was, That the Expoſition of Statutes doth belong unto the Queens tempozall Courts; and Arſcot had ſued in the ſpirituall Court foz Tythes, whereas, in truth, foz not reading of the Articles accozding to the Statute of 13 Eliz. he was depzived, ipſo facto, and ſo he was not Parſon: foz which cauſe, Gawdy prayed a Prohibition; foz he ſaid, that the ſurmiſe was good and ſufficient: Foz the Queſtion is, Parſon, oz not Parſon? and that ſhall be tried here by the Common Law.

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And I do not know that it hath ever been ruled here to the contrary before. Clench, Juſtice, It hath not been ruled to the contrary; yet becauſe great inconvenience may ariſe upon the admitting of it, The Court hath taken order, That no Prohibition ſhall be granted upon ſuch a ſurmiſe, without great probability of the truth of the ſurmiſe: Where a Prohibition is awarded upon ſuch a ſurmiſe, the party needs not to prove his ſurmiſe according to the Statute of 2 E. 6. cap. 13. for this ſurmiſe is conceived upon a cauſe of later time, ſince the ſaid Statute, and was not any cauſe to have a Prohibition at the time of the ſaid Statute.

Trin. 31 *Eliz.* In the Kings Bench. *Rot.* 759.

CCLXVIII. Winter *and* Lovedays *Caſe*.

AN an Action of Covenant by Winter againſt Loveday; It was found by ſpecial Verdict, That Winter, by Deed indented Mortgaged to Loveday, a certain Leaſe upon condition to pay 400 l. to Loveday at a day certain, at the porch of ſuch a Church, and upon ſuch payment, Winter to have back his Leaſe; and Loveday covenanted, That upon repayment of the money, he ſhould have back all his Evidences concerning the ſame; and it was further found, That at the day of payment; one Cornwallys ſent unto Loveday to know if Loveday would receive the money which Winter owed to him, at his houſe, who anſwered that he was content, and he came there, and the money was told and delivered in bags to Loveday; But afterwards ſome contention did ariſe between Winter and Loveday for certain Writings; for which cauſe Cornwallys ſaid, That if they would not agree betwixt them, That they ſhould not have his money. Whereupon Winter requeſted Cornwallis, that he might have the money to carry to the ſaid porch of the ſaid Pariſh Church, who was contented, and there Loveday came to receive it, and Winter would not pay it. Tanfield moved, That the ſame was a good payment to diſcharge the Mortgage; for the money was told in the houſe of Cornwallis, and Loveday there put it up into bags; and the ſame is a good payment and receit: Coke, contrary, Here is not any payment, for it was not the money of Winter, but of Cornwallis, as appeareth by the words of Cornwallis; (ſcil.) If they could not agree, they ſhould not have his money: Alſo Winter requeſted Cornwallis, that he might have the money to carry to the porch of the pariſh Church aforeſaid, by which it appeareth, that it was not Winters money. And for that cauſe, It was alſo the opinion of the Court, that the ſame was not any ſufficient tender. See for this, the caſe of Watkins and Aſtwick, Hill. 28 Eliz.

Trin. 30 *Eliz.* In the Kings Bench.

CCLXIX. Ordway *and* Parrots *Caſe*.

ORdway brought a Scire facias againſt Parrot and Halſey, who were bail in a Bill of Debt, for one Bennet; and they pleaded, That the ſaid Bennet had payed the money recovered, to the Plaintiff, according to the condition of the Recognizance; and it was the opinion of the whole Court, that it was no Plea, without alledging payment upon Record; for if this ſhould be ſuffered, every man ſhould be inforced twice to try his Action; wherefore the Plea was diſallowed.

Trin.

Trin. 30 *Eliz.* In the Kings Bench.

CCLXX. Coniers *and* Hollands *Case*.

IN an Action upon the Case upon Aſſumpſit, by Coniers againſt Holland, The Defendant pleaded, That after the promiſe, that the Plaintiff had diſcharged him of it: And by Wray, chief Juſtice, It is a good Plea, and ſo it hath been often ruled, and it was late the caſe of the Lord chief Baron, againſt whom in ſuch an Action, ſuch a Plea was pleaded, and he moved us to declare our opinions in Serjants-Inne: and there, by the greater opinion, it was holden to be a good Plea; for which cauſe, The Court ſaid to Buckley, who moved the Caſe; That the Plea is good, and Judgement was entred accordingly.

Mich. 33 *Eliz.* In the Common Pleas.

CCLXXI. Richmond *and* Butchers *Caſe*.

IN a Replevin, the Caſe was this; A man made a Leaſe for years, reſerving Rent to the Leſſor, his Executors and Aſſignes, where the Leſſor had a Feeſimple in the lands; it was holden by the Court, That the Rent ſhould go to the heir, notwithſtanding the ſpeciall Reſervation, becauſe the words of the Reſervation are, During the term, and the other words, To his Executors and Aſſignes, ſhall be void, and then the Rent ſhall go with the Reverſion to the Heir, which ſee, 27 H. 8. 19. by Awdley: And it was ſaid by ſome, That a Rent reſerved during the term ſhall go to the Heir with the Reverſion: and 12 E. 4. was cited, where a Rent reſerved to the Leſſor and his Aſſignes, ſhould not go to the Heir; and that theſe words, During the term, did not mend the matter, ; for the Leſſor might well overlive the term. But in the principall Caſe, it was ſaid by Periam, Juſtice, That the Executors ſhould not have the Rent, for they have not the Reverſion; but if the Leſſor grants over the reverſion, the Grantee ſhall have the Rent. And afterwards Judgment was given againſt the Plaintiff, for it was in a Replevin, and Judgment was given for the Avowant, who was Heir to the Leſſor.

CCLXXII. *Mich.* 30 *Eliz.* In the Common Pleas.

IN an Action of Treſpaſſe brought by a poor woman for breaking of her Cloſe; ſhe declared of a Continuando of the Treſpaſſe, by ſix years; and upon Nihil dicit, pleaded, ſhe had Judgement to recover; upon which iſſued forth a Writ of Enquiry of Damages; and now came the poor woman, and ſhewed to the Court, That the Jury had found too little damages, i. e. but 10 s. whereas the land is worth 4 l. per ann. and the treſpaſſe had continued by ſix years together, and prayed that the ſaid Writ might not be received, and that the Court would grant her another Writ, to have a Melius enquiry of the damages, but the whole Court denyed to grant any ſuch Writ, for ſo there might be infinite enquiries: But ſometimes, at the prayer of the Defendant, when exceſſive damages are found, or any miſdemeanors alledged in the Plaintiff, procuring or uſing ſuch a Writ of Enquiry of damages, we uſe to relieve the Defendant, by granting and iſſuing forth of a new Writ, but to the Plaintiff never, becauſe the ſuing forth of the Writ is his own act: And by Rhodes, Juſtice, The late Counteſſe of Darby

brought

brought a Writ of Dower, and had Judgement to recover; and she surmised that her husband dyed seised, and prayed a Writ of Enquiry of damages, and had it granted unto her; and because too small damages were found, she would have suppressed the said Writ, and procured a new Writ, but she could not obtain it; and at the last she was driven to bring in the first Writ, and so it was done.

Hill. 30 *Eliz.* In the Kings Bench.

CCLXXIII. Scrogs *and* Griffins *Case.*

IN an Action upon the Case, upon a promise by Scrogs, against Griffin; The Plaintiff declared, That whereas such a day, one Brown and another, did run for a wager, from Saint-John-Street, to High-gate, That he of the said two, that first got thither, and came again, should have 5 l. which wager, the said Brown did win; and whereas after the said match so performed, the said Plaintiff affirmed, that there was deceit and covin in the performance of the said match, upon which the Defendant, in consideration of twelve pence, to him delivered by the Plaintiff, promised, that if the Plaintiff can prove, that any deceit or covin was used, or practised in the performance of the said match, that then upon request, he would pay to the Plaintiff 5 l. And upon Non Assumpsit pleaded, it was found for the Plaintiff, And it was moved by Foster, in arrest of Judgement, That here is not any request set forth in the Declaration: and also, that this deceit is enquired of in London, whereas it ought to be in Middlesex where the Race was run: and it was agreed by all the Justices, That the proof ought to be made in this Action, as in the common Cases of voiages: and that request now is but matter of conformity, and not of necessity. Wray, Justice, It is cleer, That always proof ought to be as it is here; if not, that the matter be referred to a speciall proof before a person certain. And as to the triall, The deceit is not in issue, but onely the promise; and therefore the issue is well tried in London: Also this Action here includes proof and request: for there cannot be made any other proof, and the proof is the effect; for which cause he concluded, that Judgement should be entred for the Plaintiff, which was done accordingly.

Pasch. 29 *Eliz.* In the Common Pleas.

CCLXXIV. Fuller *and* Trimwells *Case.*

IN a Replevin by Fuller, against Trimwell, who made Conusance, as Bailiff to one house for damage feasance, The Plaintiff in Bar of the Conusance shewed, That one A. T. did pretend right unto the land where, &c. and the Defendant, in the right of the said A. T. took the cattel, &c. Absque hoc, that he took them as Bailiff to the said House, upon which the Defendant did demurre in Law; and it was argued by Shuttleworth, Serjeant, That the traverse is not good, which see, 26 H. 8. 8. 5 H. 7. 2. Not his Bailiff; but if the truth of the Case be so, he may plead, of his own wrong, without such cause, &c. And see also, 28 H. 6. 4. The Commandment is not traversable, but in speciall Cases, where the Commandment determines the interest of the other party, which see, 13 H 7. 12, 13. in the Case of the Earl of Suffolk in Trespasse, the Defendant pleaded, That before the trespasse, the Plaintiff was seised, and thereof enfeoffed one B. by whose commandment he entred, to which the Plaintiff said,

ſaid, That after the Feoffment, and before the treſpaſſe, the ſaid B. leaſed to the Plaintiff, to hold at will, Abſque hoc, that the ſaid B. did command him; and that was holden a good traverſe; for the commandment determines that Leaſe at will; and in the principall Caſe, all the Juſtices were of cleer opinion, That the traverſe is good; and they all ſaid, That the Cuſtos Brevium had ſhewed to them many preſidents thereof. See 15 H. 7. 17. and ſee alſo, 7 H. 4. 101, 102. In treſpaſſe for taking of cattell, the Defendant did juſtifie as ſervant to ſuch a one for Rent arrere, due to his Maſter; The Plaintiff, Replicando ſaid, That the Defendant was not Bailiff at the time of the taking, where it is ſaid by Gaſcoigne, That if the Defendant takes the cattell, claiming property, as a Heriot due to himſelf, although that afterwards the Lord agrees to the diſtreſſe, as taken for Rent arrere; yet he cannot be ſaid his Bailiff at the time of the diſtreſſe, which was granted by Rhodes, Periam, and Windham: and as to that which hath been objected, That if this traverſe be allowed, the meaning of the party ſhall be drawn in queſtion; i. e. the meaning of him who took the cattell, the ſame is not any miſchief, for ſo it is in other caſes; as in the caſe of Recaption, See 9 H. 6. 1. 45 E. 3, 4.

Paſc. 16 *Eliz.* In the Kings Bench.

CCLXXV. Humphreſtons *Caſe.*

IN an Ejectione firmæ, It was found by ſpeciall Verdict, That W. Humphreſton ſeiſed of the Mannor of Humphreſton, ſuffered a common Recovery to be had thereof by Kinnerſley and Fowk in the Writ of Entry in the Poſt, to the intent that they ſhould mak an Eſtate to the ſaid W. Humphreſton, and Elionar his wife for their lives, the remainder, Seniori puero dicti W. and to the heirs of the body dicti ſenioris pueri legitime procreat. the remainder to the heirs of the body of the ſaid W. Humphreſton, with divers remainders over. And afterwards the Recoverers, in December following, by Indenture made an Eſtate accordingly, and made Livery to W. Humphreſton and his wife; and afterwards, in November, 2 E. 6. by Indenture between the ſaid W. Humphreſton of the one party, and Kinnerſley on the other part, The ſaid W. Humphreſton did covenant with the ſaid Kinnerſley, to do all ſuch lawfull and reaſonble things for to aſſure the ſaid lands unto the uſe of the ſaid W. Humphreſton and Elionar his wife for their lives, and afterwards, to the uſe of the eldeſt childe of the body of the ſaid W. Humphreſton lawfully begotten, and to the heirs of the body of the ſaid eldeſt childe of the body of the ſaid W. Humphreſton; and after to divers other uſes over; and afterwards, Ter. Paſc. 2 E. 6. W. Humphreſton and Elionar his wife, levyed a Fine of the ſaid land to C. and B. in Fee, to the uſe of the ſaid Indenture; Elionar dyed, W. Humphreſton married another wife, and had iſſue a daughter, named Frances, and after had iſſue a ſon, named William, and died. William the ſon, being of the age of ſix years, entred into the lands, and leaſed the ſame to the Plaintiff for years, who being ejected by the Defendant, brought the Ejectione firmæ: And this ſpeciall Verdict, and the points moved upon it were argued by Atkins, Pheiplace, Fenner, Fleetwood, Plowden and Bromley, and afterwards this Caſe was argued by the Juſtices: And Gawdy, puiſne Juſtice conceived, That Judgement ought to be given for the Plaintiff: Firſt, he conceived, that this Leaſe for years made by the Infant, without Deed, and without Rent reſerved is not void, ſo as every ſtranger ſhall take advantage of it, but onely voidable; for an Infant may make a Bond, and a Contract for his commodity and profit, and the ſame ſhall binde him; as for his meat and drink,

drink, apparel, &c. But if upon ſuch Leaſe he had reſerved a ſmall Rent, as one peny, where the land was worth 100 l. per ann. ſuch a Leaſe had been void; and in our Caſe, this Leaſe was made upon the land, and was made for to trie the title to it, which is a good conſideration, and to the profit of the Infant, and for his advancement, and then the Leaſe is not void. It hath been objected, That here the Recovery being ſuffered to the intent that the Recoverers ſhould make an Eſtate, ut ſupra, &c. that the uſe ſhall riſe preſently upon the recovery to him who ſuffered the Recovery, and then the Recoverers could not make Livery unto him; he held ſtrongly, That the uſe and the poſſeſſion ſhould be adjudged in the Recoverers, untill they made the Eſtates, &c. for they otherwiſe could not make the Eſtates, &c. and theſe words [To the intent,] ſhall be conſtrued, that they ſhall have the lands, untill they made the Eſtates, &c. And he held, that the remainder limited, Seniori puero, where there is not any, in rerum natura, is good enough: as a remainder limited to him who ſhall firſt come to Pauls. And he conceived, that the ſon ſhould take this remainder, and not the daughter: and he conceived alſo, that the Eſtate tail here, was not executed, i. e. the ſecond in tail; Divers Authors of Grammer, have been produced to prove, that Puer, may be taken both wayes, Tam puer, quam puella, Deſporterius, Calapine, Melancthon, and the Grammer allowed; but I conceive, that Puer is a word proper for a Boy, and Puella for a Maid: and where we have proper words, we ought not to judge but according to them; and becauſe the word is doubtfull, we ought to conſider the cauſe upon the circumſtances, and therefore it is to be intended, that W. Humphreſton had a greater deſire that his ſon ſhould have his Inheritance, then his daughter, if there be not ſome ſpeciall matter to prove that the intent of the father was for his daughter. Southcote, Juſtice, agreed with Gawdy in the firſt point; and alſo that the Recoverers have convenient time to make the Eſtates: and that they are to make the ſame without requeſt for the benefit of the wife, who is a ſtranger to it, and is to have the lands for her joynture; and he cited the Caſe of the Abbot of York, 44 E. 3. 8. and 9. where the difference is taken between a Feoffment made upon condition to reenfeoff the Feoffor, or to enfeoff a ſtranger: And here in our Caſe the Feoffment is made in convenient time, and here is ſufficient conſideration, That the Recoverers ſhall be ſeiſed to their own uſes, untill, &c. And theſe words, [Ea intentione] ſhall be taken for a Condition: And alſo that this remainder limited, Seniori puero, is good, notwithſtanding that there be not any Senior puer alive at the time. And as to the word (puer) he held, that it did extend to both Sexes indifferently; and becauſe it is doubtfull what Sex the father intended, we are to conſtrue the ſame upon the circumſtances, which appear upon the parts of the Indentures: and here it appeareth upon the Indenture, that he hath explained his minde, (ſcil.) Eldeſt childe, be it Male or Female: As if I have two ſons, named J. and I deviſe my lands, or limit a remainder to J. my ſon, the Law ſhall conſtrue this Deviſe to extend to my younger ſon; for without deviſe or limitation my eldeſt ſon ſhould have it. But if J. S. hath two ſons, known by the names of A. and I Deviſe lands to A. ſon of J. S. there I ought to explain my meaning openly: And he conceived, That the Eſtate tail is executed defeaſable in W. Humphreſton, upon iſſue afterwards had; and that the daughter ſhould have the lands, and not the ſon; and if the Fine deſtroy the remainder in abeyance limited to the eldeſt childe, then the ſaid eldeſt childe ſhall have it, de novo, by the later conveyance. And as to the Warranty of the Fine, becauſe the poſſeſſion of the Conuſees is removed by the Statute of 27 H. 8. to the daughter, ſhe ſhall not have the benefit of the Warranty as to vouch, but ſhe ſhall Rebutt: as 22 Aſſ. 37. 69. Where a Feoffment in Fee is made to my Villein with Warranty, and

before that the Feoffor dieth, I enter upon my Villein, ſo as the Warranty upon the death of the Warrantor is not attached upon the poſſeſſion of my Villein, I ſhall not have advantage of that Warranty: A Diſſeiſor makes a Feoffment in Fee upon Condition, the Diſſeiſee releaſeth to the Feoffee with Warranty, the Diſſeiſor entreth for the Condition broken; now the Diſſeiſor ſhall Rebut by that Warranty, but not vouch. And here in our Caſe, the Fine is a diſcontinuance, ſo as the ſon is put to his Action, if he had right, and then the Warranty ſhall binde him; but contrary, if his entry be lawfull. And as to the Leaſe made by the Infant, he conceived, that it being made without Rent, it was meerly void, for it was without conſideration. Wray, chief Juſtice, As to the firſt point, he was of opinion, That the Recoverers ſhall be ſeiſed to their own uſe, untill they make the Eſtate, for that was the uſe implied; for all uſes are directed and ruled by the intent implied or expreſſed of him, to whom the land is; and his intent was, that ſuch Eſtates ſhould be made, and to ſuch purpoſe the Recovery was ſuffered: As if I enfeoff A. unto the uſe of B. for his life, there it is implied, That B. ſhall be ſeiſed of the Fee to my uſe. I covenant, That J. S. ſhall take the profits of my lands for his life, this is a good uſe of the lands for his life; and he held, that the Recoverers ſhould be ſeiſed to their own uſe, untill, &c. And the Recoverers ought to make the Eſtates within convenient time, or otherwiſe the uſe ſhould be revеſted again in him who ſuffered the Recovery; and here the Eſtate was made within convenient time: And he ſaid, That in every Caſe where a remainder is limited in abeyance to one by a proper name, the ſame is not good, but by a generall name it is good enough, if the party be in eſſe when the remainder falls: as a remainder limited upon an Eſtate for life unto the firſt ſon, or daughter of J. S. where J. S. at the time hath not any ſon or daughter, the ſame is good, if ſuch perſon ſhall be in eſſe, at the time of the death of the Tenant for life, 17 E. 3. a remainder limited, Filio primo genito, &c. and 3 E. 3. Fitz Tail. 8. Land given to J. S. Et uxori quam primo matrimonio duxerit in uxorem, and afterwards he taketh a wife, ſhe ſhall take by the ſame Conveyance. And as to the Warranty, This Fine with Warranty was levyed to C. and B. unto the uſe of himſelf for life, the remainder to the uſe of the eldeſt childe, &c. and he intended, That the daughter ſhould not have the benefit of this Warranty; for by the Statute, the poſſeſſion is removed, and transferred in the Poſt before that the Warranty could attach; and therefore the ſame ſhall not binde the ſon, neither by Voucher, nor by Rebutter: But Tenant by the Curteſie ſhall have benefit of the Warranty; for although he be in the Poſt, yet he continueth the Eſtate which was made to the wife. And as to the point in queſtion, we ought to conſider, that the Statute of 27 H. 8. of Uſes is, That Ceſtuy que uſe ſhall have the lands in ſuch plight as he had the uſe, which was without Warranty; and therefore it ſhall be transferred into poſſeſſion without Warranty: As to the Leaſe made by the Infant, without rent, profit, or other recompence, he conceived the ſame to be utterly void; as if he grant a Rent, or an Advowſon, he may ſay, that he did not grant, &c. for the thing included in the Deed, doth not paſſe, although he delivereth the Deed of Grant, with his own hand: Two joynt-tenants within age, one makes a Leaſe for years, and dieth, the other ſhall avoid it; for the Leaſe is utterly void, of which every ſtanger may take advantage; but of acts voidable, it is otherwiſe: As two Infants joynt-tenants, the one Leaſeth for life, and makes Livery in perſon, and dyeth, the other ſhall not avoid it: Two joynt-tenants, the one maketh a Feoffment upon condition, and dieth, the other ſhall not take benefit of the condition: But here the Leaſe is meerly void, of which every ſtranger ſhall take advantage, and therefore upon this point the Plaintiff ſhall be barred. And alſo he was of opinion, That this remainder in

abeyance

abeyance limited, Seniori puero, was not deſtroyed by the Fine, for it is in the conſideration of the Law, and ſo preſerved by the Law; and therefore a deſcent in the time of vacation of an Abbot, ſhall not binde the ſucceſſor; and ſo where the party is beyond the ſeas, for ſuch perſons and their eſtates the Law priviledgeth and preſerveth: So a remainder limited to the right heirs of J. S. And where the King ſeiſeth by reaſon of Ward, and during ſuch ſeiſin of the King, a deſcent is caſt, the ſame ſhall not binde him who hath right; for he could not enter upon the poſſeſſion of the King: and by the Statute of 32 H. 8. A Recovery had againſt Tenant for life, the remainder unto the right heirs of J. S. who is alive at the time of the Recovery, is not helped by the Statute of 32 H. 8. For the words of the Statute are, To whom the reverſion or remainder ſhall then appertain: See 11 R. 2. Fitz. Detin. 46. and ſo be concluded, becauſe that this remainder is in the cuſtody of the Law, and not in eſſe, it is priviledged and preſerved, and not deſtroyed by the Fine; and upon iſſue had, the remainder ſhall be executed, notwithſtanding the ſaid act done by the father; and without any entry to be made by the Conuſees to raiſe the uſe, for the remainder limited, Seniori puero, neither was, nor could be diſcontinued: As to the principall point of the Caſe, viz. How theſe words, Seniori puero, ſhall be expounded, although divers Authorities have been cited out of Latine Authors, That this word (puer) ſhall be taken for the Male, or Female; yet I conceive, That more commonly, it ſhall be taken for the Male then for the Female, and we ought to judge according to the intent of the parties, and not according to the ſtrict ſignification of the word in Latine, eſpecially where it is doubtfull how it ſhall be expounded: 9 H. 7. 16. A. was bound in a Bond upon condition to pay, decem libras auri puri; although there be not any ſuch phraſe in Latine, yet becauſe it appeareth ſo to be the meaning of the Obligee to have fine gold, it was ſo taken: 39 H. 6. 10. and 11. The word (uterque) id eſt, quilibet pro parte ſua, See the Book: ſo it was lately adjudged in the Court of Common Pleas, where three were bounden, Et eorum uterque, which was conſtrued to be, Quilibet, for we ought always in conſtruction of Deeds, to have regard to the meaning of the parties, and not to argue the aptneſs of the Latine word; and I conceive, That if a Leaſe be made for life, the remainder, puero, of J. S. who hath a ſon and a daughter, the ſon ſhall have the land, &c. for the moſt worthy ſhall be preferred; and therefore, if a Freeman marrieth a Neife, ſhe is enfranchiſed for ever, according to the opinion of Fitzherbert, which I hold to be good Law, for the husband is the more worthy: So if the Leaſe for life be made to J. S. the remainder to the right heirs of A. B. who hath iſſue three daughters, and dieth, the eldeſt ſhall have the remainder, and not the other with her, becauſe ſhe is the more worthy; and ſo a remainder upon an Eſtate for life of lands in Gavilkinde limited to the right heirs of J. S. who hath iſſue two ſons, the eldeſt ſhall have it: So here in the principall Caſe, (Puer) ſhall be expounded ſon, becauſe he is the more worthy: But here are other circumſtances, which give occaſion of another conſtruction; for this doubtfull word, (Puer) is explained by the Engliſh Indenture, which the father, W. Humphreſton, cauſed to be made; [Unto the uſe of the eldeſt child] which is a good expoſition of the former Conveyance: and I am of opinion, that the ſame ought to be meant of the daughter, for ſo ſoon as ſhe is born, the remainder veſts in her, and by the birth of the ſon after, ſhall not be deveſted: Land is leaſed to A. for life, the remainder to T. ſon of A. and hath two ſons of the ſame name, the eldeſt ſhall have it, becauſe the more worthy; but, if afterwards the Donor declares his meaning to the contrary, the ſame ſhall ſtand, &c. And afterwards Judgement was given againſt the Plaintiff, and that the daughter ſhould have the Lands.

CCLXXVI. *Paſch.* 16 *Eliz.* In the Kings Bench.

A Man deviſed his Lands to his Wife for life, and becauſe he was in doubt, whether he ſhould have iſſue or no, he further willed by his Will, That if he ſhould not have any iſſue by his Wife, that then, after the death of his Wife, the lands ſhould be ſold, and the money thereof coming, diſtributed to three of his blood, and made his Wife and another his Executors, and died; The Executors proved the Will, The other Executor died, and the Wife ſold the lands, and it was the opinion of Wray and Southcote, Juſtices, That the ſale was good, although it be not expreſſed in the Will, by whom the lands ſhould be ſold; for the moneys coming of the ſale, are to be diſtributed by his Executors, to perſons certain, as Legacies, and it appertains to Executors to pay the Legacies, and therefore they ſhall ſell, &c. As if a man willeth, That his lands ſhall be ſold, and that the moneys coming thereof, ſhall be diſpoſed of for the payment of his debts; now the Executors ſhall ſell the lands, for to them it belongs to pay debts: Alſo they held, that the lands ſhould be ſold in the life of the Wife, otherwiſe it could never be ſold; and alſo the ſurviving Executor ſhall ſell the lands, becauſe the authority doth ſurvive.

1 Cha. Ca. 176
1 Cha. Rep. 283
1 Leo. 304

CCLXXVII. *Paſc.* 16 *Eliz.* In the Kings Bench.

THree men were bounden by Recognizance, jointly and ſeverally, againſt all which the Conuſee ſued forth Execution by Scire facias; and upon iſſue joyned, it was found for the Plaintiff in the Kings Bench, and Execution awarded by Capias ad ſatisfaciend. And becauſe the ſame, erronicè emanavit, being upon a Recognizance, it was drawn off the File; and now the Conuſee brought an Action of debt upon the Judgement againſt one of them, and the opinion of the whole Court was, that it would not lie, becauſe the Judgement was joynt againſt them all three.

CCLXXVIII. *Paſc.* 16 *Eliz.* In the Kings Bench.

A Brought an Action upon the Caſe, and declared, That the Dean and Chapter of Weſtminſter, did Leaſe unto him a houſe for years by Deed indented, of which Indenture he was poſſeſſed, and afterwards loſt it, and by Trover it came to the hands of the Defendant, who ſold it, and converted the money thereof coming, to his own uſe; The Defendant pleaded, Not guilty; and the Plaintiff gave in Evidence, That the ſaid Leaſe was made to him, and to one B. and that the ſaid Indenture was delivered to the ſaid B. (And that was agreed to be the poſſeſſion of them both) and afterwards B. died, and afterwards A. the Plaintiff, was the ſole owner of it, and that was holden to be good Evidence on the part of the Plaintiff; and if the Plaintiff can prove the other part of his Declaration, i. e. that the Indenture came unto the hands of the Defendant, and that he ſold it, that then he ſhould recover. But it was given in Evidence on the Defendants parts, that the ſaid B. ſold to the ſaid Defendant his part and intereſt in the ſaid Leaſe, and alſo the ſaid Indenture; ſo as now he is become Tenant in common with the Plaintiff, and then his ſale doth not give any cauſe of Action to the Plaintiff, and that was holden by the whole Court, to be good evidence without pleading of it; The Caſe went further; That A. being within age, his father leaſed the lands for 20 years, and afterwards

the

the ſon at his full age upan the back of the Indenture did releaſe to the Defendant all his right; and it was holden by Wray, Juſtice, That when the father leaſed, he did it as Guardian to his ſon; and it was not any Eſtoppment of the ſon, but it was a Leaſe in the behalf of the ſon, although the ſon might avoid it, and then when the endorſment is ut ſupra, the ſame is a good aſſignment; and afterwards the Plaintiff was Nonſuit.

CCLXXIX. *Paſc.* 16 *Eliz.* In the Kings Bench.

IN an Action upon the Caſe, the Plaintiff declared, That B. by his Will, did deviſe to each his daughters, he having two daughters, 200 l. and that the ſurvivor ſhould have the whole; and ſhewed further, that one of his two daughters died, and that B. made his wife his Executrix, and died, and that the ſaid wife took to husband the Defendant; and further declared, That the Defendant in conſideration of all that, and that the Defendant ſhould take the ſurviving daughter to wife, and in conſideration that the Defendant had Aſſets to pay all Debts and Legacies, &c. did promiſe to pay to the Plaintiff 400 l. at four ſeverall days: The firſt day of payment entarred, and no money was paid, whereupon the Plaintiff brought the Action; the Defendant pleaded, That he made no ſuch promiſe; and it was found for the Plaintiff, and damages were aſſeſſed for the default of payment at the firſt day; and that was moved in arreſt of Judgement, becauſe the Aſſumpſit was entire, and the Plaintiff ought to have forborn his ſuit untill all the days of payment were paſt, and then to have one entire Action for the whole; but the opinion of the whole Court was againſt that; for they ſaid, It is not like unto a Debt upon a Contract, or a Bill, where the debt is to be paid at ſeverall days; for here no debt is to be recovered, but onely damages for the debt; and this default of payment is a wrong, and therefore the Action will well lye, and ſo it was adjudged.

CCLXXX. *Paſc.* 16 *Eliz.* In the Kings Beneh.

A. deviſed, that his lands ſhould deſcend to his ſon, but he willed, That his wife ſhould take the profits thereof untill the full age of his ſon, for his education and bringing up, and died; the wife married another husband, and died before the full age of the ſon; and it was the opinion of Wray and Southcote, Juſtices, That the ſecond husband ſhould not have the profits of the lands untill the full age of the ſon; for nothing is deviſed to the wife but a confidence, and ſhe is as Guardian, or Bailiff for to help the Infant, wich by her death is determined; and the ſame confidence cannot be transferred to the husband; but contrary, if he had deviſed the profits of the land unto his wife untill the age of the Infant to bring him up and educate him, for that is a Deviſe of the land it ſelf.

Paſc. 16 *Eliz.* In the Common Pleas.

CCLXXXI. Bawell *and* Lucas *Caſe.*

IN a Replevin by Bawell againſt Lucas; It was agreed by all the Juſtices, viz. Mounſon, Manwood, Harper, and Dyer, That if a man ſeiſed of a Mannor, Leaſeth part of the Demaines for years, or for life, That the reverſion doth remain parcell of the Mannor, but ſuch a reverſion by the Grant of the Manno', doth not paſſe without Attornment

of

of the Leſſee: And where a Mannor is granted by Feoffment unto another, and afterwards the Tenants Attorn, the ſervices paſſe by the Liverie, and not by any Grant; and although in the firſt Grant the Leſſee doth not Attorn, but a long time after, yet the Reverſion is not ſevered from the Mannor; for the Attornment, as to that intent, ſhall have relation to the Livery to make the reverſion to paſſe from the time of the Grant, but not to charge the Leſſee with Waſte: and Dyer ſaid, That if a Feoffment in Fee be made of a Mannor, with an Advowſon appendant, and the Tenants do not Attorn, yet the Feoffee ſhall have the Advowſon; for the Advowſon is appendant to the Principall part of the Mannor, (ſcil.) the Demanes, and cannot be appendant to the ſervices: and Dyer ſaid, That if A. maketh a Feoffment in Fee of a Mannor, part of which is in Leaſe for years, Habendum, to the Feoffee and his heirs, to the uſe of the Feoffee and his heirs upon condition that the Feoffee ſhall pay to the Feoffor within ten days, 1000 l. and if he fail, then to the uſe of the Feoffor for life, the remainder to the uſe of his ſon in tail, and the money is not paid, the Leſſee attorns after the ten days to the Feoffee, the ſame is a good Attornment to raiſe the ſecondary uſes, although that the firſt uſes did not take effect; for the condition is not annexed to the Eſtate of the land, but unto the uſe onely: and the meaning was, that the Feoffor ſhould never have again the Inheritance: A Feoffment is upon condition, that the Feoffee ſhall give the land in tail to a ſtranger, who refuſeth the gift, there Feoffor may re-enter; but a Feoffment upon condition to enfeoff a ſtranger, or to grant a Rent charge; now if the ſtranger refuſeth, there the Feoffor ſhall not re-enter, for his intent was not, that the land ſhould revert, &c.

Hill. 16 *Eliz.* In the Common Pleas.

CCLXXXII. Vavaſors *Caſe.*

THe Caſe was, That Nicholas Ellis ſeiſed of the Mannor of Woodhall, Leaſed the ſame to William Vavaſor and his wife, for the life of the wife, the remainder to the right heirs of the husband; The husband made a Feoffment in Fee to the uſe of himſelf and his wife for their lives, the remainder to his right heirs, the husband dyed, the wife held in, and committed waſte in a Park, parcell of the Mannor; It was moved, if the Writ of Waſte ſhall ſuppoſe that the wife holdeth in, Ex dimiſſione Nichol. Ellis, or, Ex dimiſſione viri: and the opinion of all the Juſtices was, That the Writ upon this matter ought to be generall; viz. That ſhe holds in, de hæreditate, J. S. hæredis &c. without ſaying, ex dimiſſione hujus, vel illius, for ſhe is not in by the Leſſor, nor by the Feoffees, but by the Statute of Uſes; and therefore the Writ ſhall be, Ex hæreditate, &c. And alſo the opinion of the Juſtices was, That the wife in this caſe, is not remitted, but that ſhe is in according to the form of the Feoffment: Dyer, The Formedon brought againſt Manures, rehearſed in the Writ, a Will and divers Conveyances, by reaſon of which, the Writ was of exceeding length; and in ſuch caſes the Writ is good; yet if the Writ be generall, it is ſufficient. Note in this Caſe, That the Plaintiff aſſigned the waſte in deſtroying of Deer in the Park: And Mead, Serjeant, ſaid, That waſte cannot be aſſigned in the Deer, unleſſe the Defendant hath deſtroyed all the Deer, and of that opinion was Dyer: Manwood, If the Leſſee of a Pigeon-houſe deſtroy all the old Pigeons but one or two couple, the ſame is waſte; and if the Keeper doth deſtroy all the Deer, ſo as the ground is become not Park-

able

able, the ſame is waſte, although he hath not deſtroyed the whole: See 8 R. 2. Fitz. Waſt: 97. If there be a ſufficient ſtore left in a Park, Pond, &c. it is well enough, &c.

Hill. 16 *Eliz.* In the Common Pleas.

CCLXXXIII. Muttons *Caſe.*

JAne Mutton brought a Writ of Entry, Sur diſſeiſin, againſt Anne Mutton who pleaded, That one John Mutton was ſeiſed, and levyed a Fine to the uſe of himſelf, and ſuch wife and wives as the ſaid John ſhould after marry, by what name or names they ſhould be called, for term of their lives, and afterwards to the uſe of the ſame Jane, now Demandant in tail, the remainder over to the right heirs of the ſaid John Mutton, and afterwards the ſaid John Mutton toke to wife, the now Tenant, upon which War the Demandant did demurre in Law. And it was argued by Jeofries, Serjeant, That here the wife taketh nothing by this limitation, becauſe ſhe was not capable thereof at the time of the limitation; But if the uſe had been limited eſpecially to John Mutton, untill he took a wife, and then unto the uſe of him and his wife for their lives, the ſame had been a good uſe to the wife: But in our Caſe, the uſe is limited to the wife in præſenti, and not upon a contingent; and becauſe the wife at the time of the limitation was not capable, ſhe ſhall never take after; and yet it may be ſaid, That a joynt Eſtate may be in eſſe, and yet to begin at ſeverall times: as 18 E. 4. 12. A Feoffment is made to three, and Livery is made to one of them; and firſt one of them agrees to the Livery, and a year after, another agreeth, and afterwards the third; although they take nothing untill agreement, yet when they have agreed, the agreement ſhall have relation to the time of the Livery; but in truth, the reaſon thereof is, becauſe the Freehold ſhall be adjudged in them all, untill they have diſagreed. And if a diſſeiſin be to the uſe of A. B. and C. And firſt A. agrees to it, and afterward B. and after C. although they took nothing untill agreement, yet when they have agreed, their agreement ſhall have relation to the time of the firſt diſſeiſin; and if in ſuch caſe the Diſſeiſor had made a Leaſe before agreement, the party to whoſe uſe after agreeing, ſhall avoyd ſuch Leaſe.

Hill. 16 *Eliz.* In the Common Pleas.

CCLXXXIV. Stamfords *Caſe.*

THe Caſe was, A. took a wife, and afterwards married Elizabeth Stamford, living his firſt wife, and by Deed gave part of his goods to the ſaid Elizabeth; and as to the reſidue of his goods, being but of ſmall value, he made the ſaid Elizabeth his Executrix, and died; ſhe refuſed the Executorſhip, for which the Ordinary committed Adminiſtration to B. Gawdy, Serjeant, asked the advice of the Court, againſt whom the Action of Debt ſhould lie? for, if the Creditor impleadeth the Adminiſtrator, he hath not Aſſets; if the Executrix her ſelf, ſhe will plead that ſhe hath renounced the Executorſhip, and that Adminiſtration is committed to B. And the opinion of Dyer, Juſtice was, That the Gift is void by the Common Law, and alſo by the Statute of 13 Eliz. and then, if the Gift be void any way, the Creditor may have an Action of Debt againſt the ſaid Elizabeth as Executor of her own wrong: And ſee that ſuch a Gift is

3. Le. 57.

void

void by the Common Law, 43 E. 3. 2. And by Manwood, Juſtice, He who takes the goods of the dead, ſhall not be charged as executor of his own wrong, unleſſe he doth ſomething as Executor: as to pay Debts, make Acquittances, &c. See 41 E. 3. 31. 32 H. 6. 7. Dyer, If one takes the goods of the dead, and converteth them to his own uſe, he is chargeable as Executor, and ſo it hath been adjudged in the time of this Queen, in the Caſe of one Stokes, which was affirmed by Bendloes and Harper: See now C. 2 Part. 53. Reades Caſe; where no lawfull Executor, or Adminiſtrator is, there, if a ſtranger takes the goods of the dead into his poſſeſſion, the ſame is a good Adminiſtration to charge him as Executor of his own wrong.

CCLXXXV. *Hil.* 16 *Eliz.* In the Common pleas.

THe Caſe was, A man made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of his eldeſt ſon in tail; and after, to the uſe of his right heirs, not having at the time of the Feoffment any ſon; afterwards he ſuffered a common Recovery, had iſſue a ſon, who dyed in the life of his father, having iſſue a ſon, and afterwards he himſelf dyed; It was holden by the Juſtices in this Caſe, That the ſon and heir of the ſon ſhould not avoid this Recovery by the Statute of 32 H. 8. for there was not any remainder in him at the time of the Recovery had, and the words of the ſaid Statute are; That ſuch Recovery ſhall be void againſt ſuch perſons to whom the reverſion, or remainder ſhall then appertain, i. e. at the time of ſuch Recovery. And it was ſaid by one of the Serjeants at Bar; That if lands be given to E. for life, the remainder to B. in tail, the remainder to C. in Fee, B. dyeth, his wife young with childe, with a ſon; a Recovery is had againſt E. with the aſſent of C. and afterwards the ſon is born, he ſhall not be helped by this Statute of 32 H. 8. for that remainder was not in eſſe, at the time of the Recovery. But it was holden in the principall Caſe, That the heir might avoid the ſaid Recovery by the Common Law; for the recompence cannot extend to ſuch a remainder, which is not in eſſe.

Paſc. 27 *Eliz.* In the Common Pleas.

CCLXXXVI. Sidenham *and* Worlingtons *Caſe.*

K. 42. 4 IN an Action upon the Caſe; upon a Promiſe, the Plaintiff declared, That he at the requeſt of the Defendant, was ſurety and bail for J. S. who was arreſted into the Kings Bench, upon an Action of 30 l. and that afterwards, for the default of J. S. he was conſtrained to pay the 30 l. after which, the Defendant meeting with the Plaintiff, promiſed him for the ſame conſideration, That he would repay that 30 l. which he did not pay, upon which the Plaintiff brought the Action; the Defendant pleaded, Non aſſumpſit, upon which iſſue was joyned, which was found for the Plaintiff. Walmeſley Serjeant, for the Defendant, moved the Court, That this conſideration will not maintain the Action, becauſe the conſideration and promiſe did not concurre and go together; for the conſideration was long before executed, ſo as now it cannot be intended that the promiſe was for the ſame conſideration: As if one giveth me a Horſe, and a Month after, I promiſe him 10 l. for the ſaid Horſe, he ſhall never have Debt for the 10 l. nor Aſſumpſit upon that promiſe; for there it is neither contract, nor conſideration, becauſe the ſame is executed: Anderſon, This Action will not lie; for

for it is but a bare agreement, & nudum pactum, becauſe the contract was determined, and not in eſſe at the time of the promiſe; But he ſaid, it is otherwiſe upon a conſideration of marriage of one of his coſins; for marriage is always a preſent conſideration: Windham agreed with Anderſon, and he put the Caſe in 3 H. 7. If one ſelleth a Horſe unto another, and at another day he will warrant him to be ſound of limb and member, it is a void warrant, for that ſuch warranty ought to have been made or given at ſuch time as the Horſe was ſold: Periam, Juſtice, conceived, That the Action did well lie; and he ſaid, That this Caſe is not like unto the Caſes which have been put of the other ſide: For there is a great difference betwixt Contracts and this Caſe; for in Contracts upon ſale, the conſideration, and the promiſe, and the ſale, ought to meet together, for a Contract is derived from con and trahere, which is a drawing together, ſo as in Contracts every thing which is requiſite, ought to concurre and meet together, viz. the conſideration of the one ſide, and the ſale or the promiſe on the other ſider; But to maintain an Action upon an Aſſumpſit, the ſame is not requiſite, for it is ſufficient, if there be a moving cauſe, or conſideration precedent; for which cauſe or conſideration the promiſe was made; and ſuch is the common practice at this day: For in an Action upon the Caſe, upon a promiſe, The Declaration is laid, That the Defendant, for, and in conſideration of 20 l. to him paid, (poſtea ſcil.) that is to ſay, at a day after ſuper ſe aſſumpſit, and that is good; and yet there the conſideration is laid to be Executed; And he ſaid, that the Caſe in Dyer, 10 Eliz. 272. would prove the Caſe: For there the Caſe was, That the Apprentize of one Hunt, was arreſted when his Maſter Hunt was in the Countrey, and one Baker, one of the neighbours of Hunt, to keep the ſaid Apprentize out of priſon, became his bail, and paid the Debt; afterwards Hunt the Maſter, returning out of the Countrey, thanked Baker for his neighbourly kindneſſe to his Apprentize, and promiſed him, that he would repay him the ſum which he had paid for his ſervant and Apprentize: And afterwards, upon that promiſe, Baker brought an Action upon the Caſe againſt Hunt, and it was adjudged in that Caſe, that the Action would not lie, becauſe the conſideration was precedent to the promiſe; but becauſe it was executed and determined long before. But in that Caſe, it was holden by all the Juſtices, That if Hunt had requeſted Baker to have been ſurety or bail, and afterwards Hunt had made the promiſe for the ſame conſideration, the ſame had been good, for that the conſideration did precede, and was at the inſtance and requeſt of the Defendant. Rhodes, Juſtice, agreed with Periam; and he ſaid, That if one ſerve me for a year, and hath nothing for his ſervice, and afterwards, at the end of the year, I promiſe him 20 l. for his good and faithfull ſervice ended, he may have and maintain an Action upon the Caſe upon the ſame promiſe, for it is made upon a good conſideration; but if a ſervant hath wages given him, and his Maſter, ex abundanti doth promiſe him 10 l. more after his ſervice ended, he ſhall not maintain an Action for that 10 l. upon the ſaid promiſe; for there is not any new cauſe or conſideration preceding the promiſe; which difference was agreed by all the Juſtices, and afterwards, upon good and long advice, and conſideration had of the principall Caſe, Judgement was given for the Plaintiff, and they much relied upon the Caſe of Hunt and Baker, 10 Eliz. Dyer, 272. See the Caſe there.

Trin. 25 *Eliz.* In the Common Pleas

CCLXXXVII. Highams *Caſe.*

IT was found by ſpeciall Verdict, That Thomas Higham was ſeiſed of 100 acres of lands, called Jacks, uſually occupied with a houſe; and that he let the ſaid houſe, and 40 of the ſaid 100 acres to J. S. for life, and made his Will, by which he deviſed the ſaid houſe, and all his lands, called Jacks, then in the occupation of the ſaid J. S. unto his wife for life, and that after the deceaſe of his wife, the remainder thereof, and of all his other lands belonging to Jacks, ſhould be to R. his ſecond ſon, &c. And by Mead, The wife ſhall not have by implication the reſidue of Jacks; for ſhe had an expreſſe Eſtate in the houſe and 40 acres of lands, and having expreſſed his Will concerning the ſame, it ſhall not be extended by implication; and he ſaid, It had been adjudged betweenn Glover and Tracie, That if lands be deviſed to one, and the heirs Males of his body, and if he die without heirs of his body, that then the land ſhall remain over, that the Donee hath but an Eſtate in tail to the heirs Males of his body: Anderſon, in the time of Sir Anthony Brown, It was holden that if a man ſeiſed of two acres of lands, deviſeth one of them to his wife for life, and that J. S. ſhall have the other acre after the death of his wife, that the wife hath not any Eſtate in the later acre. It was alſo moved, What thing ſhall paſſe to his ſecond ſon by this Deviſe? and by the Lord Anderſon, The words, uſually occupied with it, amount to the words; The lands let with it; but theſe 60 acres are not let with it, therefore they ſhall not paſſe: Windham, contrary; Although they do not paſſe by the words, occupied with it, yet they ſhall paſſe by the name of Jacks, or belonging to Jacks; and afterwards, Anderſon, mutata opinione, agreed with him.

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